STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ROBERT H. HICKAM, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos 80-CE-105-D 80-CE-165-D 80-CE-195-D 80-CE-207-D 8 ALRB No. 102

DECISION AND ORDER

On November 13, 1981, Administrative Law Officer (ALO) Leonard Tillem issued the attached Decision in this proceeding. Thereafter, General Counsel and Respondent each timely filed exceptions with a supporting brief. Respondent filed a brief in response to General Counsel's exceptions.

Pursuant to Labor Code section 1146,[1/] the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the ALO's rulings, findings, and conclusions and to adopt his recommended Order as modified herein.

Respondent is solely owned by Robert H. Hickam (Hickam) and his wife Shirley. On October 21, 1975, the Board conducted an election among Respondent's agricultural employees pursuant to

[1/] All section references herein refer to the California Labor Code unless otherwise indicated.

a petition filed by the United Farm Workers of America, AFL-CIO (UFW or Union). On July 12, 1977, the Board certified the UFW as the exclusive collective bargaining representative of all of Respondent's agricultural employees in the State of California. Thereafter Respondent refused to bargain with the UFW. On October 19, 1978, the Board found that Respondent had violated section 1153(e) and (a) of the Agricultural Labor Relations Act (Act or ALRA) and ordered Respondent to make its agricultural employees whole. Respondent appealed the Board's Decision and Order in Robert H. Hickam (Oct. 19, 1978) 4 ALRB No. 73, and continued to refuse to bargain with the UFW. On December 28, 1979 the California Court of Appeals for the Fifth District denied Respondent's Request for Review. On March 3, 1980, the UFW sent a letter to Respondent requesting it to bargain and requesting information concerning its agricultural operation including the names of all its employees, their social security numbers, addresses, job classifications, wages, fringe benefits, crop information, and production information.

On April 3, 1980, Respondent and the UFW began to negotiate. The UFW repeatedly requested information from Respondent about all of the agricultural employees on its payroll and crop and production information from all properties on which its agricultural employees worked. Respondent was prepared to give the UFW information regarding property it alone owned or leased at any time between July 1977, and the time of the negotiations, but refused and/or failed to give the Union any information regarding property it did not solely own or

lease.[2/] The UFW requested information on all of the agricultural employees on Respondent's payroll, contending they were all part of the bargaining unit certified by the Board to be represented by the UFW. Wage and related information pertaining to employees in the bargaining unit is presumptively relevant to the bargaining process. (Curtiss Wright Corp., Wright Aeronautical Division v. NLRB (3d Cir. 1965) 347 F.2d 61 [59 LRRM 2433]; Boston Herald-Traveler Corp. v. NLRB (1st Cir. 1955) 223 F.2d 58 [36 LRRM 2220].) Information relating to the status of employees as unit employees is relevant to the bargaining process. (See Curtiss Wright Corp., Wright Aeronautical Division v. NLRB, supra, 347 F.2d 61.) Respondent has failed to rebut the UFil's showing that the information requested by the UFW is relevant to the collective bargaining process. Respondent's Agricultural Employer Status

The evidence as a whole shows that Respondent does more than provide labor for a fee and is the agricultural employer of all agricultural employees on its payroll. We so find. Considering the factors set forth in Tony Lomanto (June 18, 1982) 8 ALRB No. 44, to determine whether Respondent is the agricultural

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[2/] Respondent never told the UFW directly that it would not give the Union information regarding property Respondent did not solely own or lease. Those properties not solely owned or leased by Respondent are H & M, H, M, and Z, El Dorado, property owned by Hubert "Dean" Wyrick, Poxin Ranch, Mountain View Ranch (Grewal Bros.), property owned by Howard Rainey, property owned by John Morton (which was previously owned by William Horton), M & 3, property owned by Victor Glaze, Griggs Ranch, Goya Ranch, property owned by Kent Burt, property owned by Bruce Myers and Zucca Farms. Respondent owns Kameo, Rowley, Young, and Nelson Ranch, leases the Vineyard and owned Griggs Ranch from February 1978 to March 1979.

employer of those agricultural employees listed on its payroll, we find as follows:

As an equal partner, Robert Hickam has and has had the day-to-day responsibility for the farming operations at H & M and H, M, & Z, but delegated that responsibility to his supervisor/ranch manager, Claude Miller. Robert H. Hickam managed Mt. View from March 1978 to September 1978, and owned Griggs Ranch from February 1978 to March 1979. Hickam also managed El Dorado from 1970 to 1976.[3/]

Respondent's crews are responsible for the performance of assigned tasks and operations for which they are paid. Respondent hires and determines the hours, wages, and working conditions of those employees and has the ultimate authority to discipline and/or discharge them.

As to H & M and H, M, & Z, Hickam has the authority to decide what work shall be done and exercises that authority in most instances after consulting one or both of the other partners who are not "farmers."[4/] As to other properties, Respondent makes the final decisions regarding the harvesting in order to coordinate the harvest with its packing shed operation to maximize efficiency. As to non-harvest operations, Respondent has some input in the decision making process because most of the

[3/]The 1970-1976 period preceded the Board certifying the UFW as the exclusive bargaining representative of Respondent's agricultural employees, but this fact is relevant to show the long standing relationship Respondent had with El Dorado.

[4/]Andrew Marincovich is an accountant who lives in Long Beach, California and Lawrence Zuanich is a fisherman who lives in Fort Lauderdale, Florida.

properties it services are owned by "non-farmers."

Respondent provides all the labor and also provides the supervisors for all farming operations, as well as the tools and equipment necessary to perform the work. It provides the gondolas, trailers, and trucks for juice grapes and provides the pick boxes, pallets, bands, and trucks to haul table grapes to its commercial packing shed. (See Kotchevar Brothers (Mar. 2, 1976) 2 ALRB No. 45.) Respondent also provides the equipment for non-harvest operations such as dusting, tilling, and spraying. Such equipment includes tractors, discs, sprayers, and dusters.

Respondent's trucks and truck drivers haul the produce from the field to its packing shed and from the packing shed to Mendelson-Zeller for marketing. Contrary to the testimony of Robert H. Hickam, the record herein establishes that Respondent bears some risk for crop loss. The records of transactions between Respondent and Mendelson-Zeller show that Respondent has some proprietary interest in the crop marketed. All produce packed by Respondent is sold (marketed) through Mendelson-Zeller. The sales of the produce are credited to Respondent's account and not to the account of the property owner(s). Respondent sold the juice grapes from Poxin Ranch in September 1977 pursuant to its own contract with a winery.

Hickam is or has been in partnership with Andrew Marincovich since 1978, and with Lawrence Zuanich since June 1979. Marincovich and Zuanich are two of the five partners who own El Dorado. As previously stated Robert H. Hickam managed El Dorado from 1970 to 1976. Hubert "Dean" Wyrick purchased his

property from Robert H. Hickam's father-in-law and has worked for Respondent since 1955.

Respondent has been harvesting and packing grapes for El Dorado and Wyrick since 1970, and has also utilized its employees to do nonharvest work on those properties at all times material herein. Respondent does not pack fruit for any of the property owners it serves pursuant to written contracts, but assumes it will continue such packing unless told otherwise. Respondent's employees perform nonharvest work "as a favor" to Robert H. Hickam's neighbors who do not have agricultural employees or the necessary equipment. Respondent has a substantial investment in its harvest operation which includes boxes, trucks, forklifts, and a packing house. The packing house would not operate efficiently or profitably without the produce from properties not owned or leased by Respondent. Respondent also owns nonharvest equipment such as tractors, discs, sprayers, tillers, and other equipment necessary to an agricultural operation. Due to its specialized nature and high cost, most of Respondent's equipment is not easily liquidated.

Hubert "Dean" Wyrick testified that he made all the decisions regarding the work done on his property and that he set the wages, hours, and working conditions of the employees who worked on his property, which is located across the road from Respondent's property. Wyrick often contacts the workers directly about performing work on his property, but Respondent has the ultimate authority to direct, or permit them to work on Wyrick's property.

The owners of the other properties which Respondent neither owns nor leases did not testify at the hearing. Respondent contends that it is not a custom harvester[5/] and that Hector Rodriguez (Hector) is generally a labor contractor.[6/] Hector testified that he does not know the owners of the properties on which his crews work; and that all he knows is that he works for Robert H. Hickam.

Many of the agricultural employees who perform work on other properties also work on properties owned or leased by Respondent. Some of the employees work year-round or almost year-round for Respondent and are not on any other grower's payroll. Respondent uses its own rates when making unemployment insurance payments and workers' compensation insurance payments, regardless of where the employees perform their work. It does not use the rates of the other property owners. Thus, workers' compensation and unemployment claims are charged against

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[5/] It is well settled NLRB precedent that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a refusal and/or failure to bargain in bad faith is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. (Pittsburg Plate Glass Co. v. NLRB (1941) 313 U.S. 146 t8 LRRM 425]; Peabody Coal Company (1982) 262 NLRB No. 117 [110 LRRM 1391]; Friendly Ice Cream Corp. (1982) 262 NLRB No. 112 [110 LRRM 1400].)The issue of whether or not Respondent is a custom harvester was not raised prior to this proceeding. There is insufficient evidence in the record to determine whether Respondent could have raised the issue at a representation proceeding. Respondent could have petitioned the Board for a Unit Clarification without violating the Act, but did not do so. We encourage the use of our unit clarification procedure as a means of preventing unfair labor practice litigation.

[6/] Robert H. Hickam testified that Hector Rodriguez is a supervisor when he works for Respondent.

Respondent.

We conclude that Respondent is the agricultural employer of all agricultural employees on its payroll since July 12, 1977, for collective bargaining purposes.[7/] Respondent has ultimate control over the wages, hours, and working conditions of all agricultural employees on its payroll. Although Robert H. Hickam testified that in a few instances he had no control over the work performed by certain employees, there is insufficient evidence to establish that Respondent was not their agricultural employer in those instances, as the record strongly suggests that it had exercised control over those employees in all aspects of their employment. On the basis of the record as a whole, we find that Respondent's agricultural business is that of a custom harvester-packer, and that Respondent is the agricultural employer of all agricultural employees on its payroll.

Accordingly, we conclude that Respondent's refusal to provide information to the UFW about the employees who worked on the property not solely owned or leased by it and information about crops grown on said property violated section 1153(e) and (a) Credibility of Respondent's Negotiators

Respondent has requested the Board to reprimand the ALO because of his statements regarding the credibility of Mr. Hogan and Mr. Hipp, Respondent's collective bargaining representatives.

[7/] We do not imply that agricultural employees who are not on an agricultural employer's payroll are not its employees. We do not limit an employment relationship to an employer's payroll. However, in this case Respondent's payroll records are the best evidence of the employment relationship.

Mr. Hogan and Mr. Hipp acted as Respondent's negotiators with the UFW and also represented Respondent at the hearing in this matter. The ALO found the testimony of Mr. Hogan and Mr. Hipp to be in large measure self-serving and lacking in credibility. The ALO stated, "Hogan and Hipp sought not only to establish their credibility as witnesses, but also attempted to establish their credibility and effectiveness as the Respondent's representative."

"An attorney who attempts to be both advocate and witness impairs his credibility as witness and diminishes his effectiveness as advocate." (Comden v. Superior Court (1978) 20 Cal.3d 906.) At the time Comden was decided, the California Rules of Professional Conduct, Rule 2-lll(a)(4), prohibited the employment of an attorney or the attorney's law firm if the attorney knew or should have known that he/she or a lawyer in his/her firm would be called as a witness on behalf of the client. Subsequently, Rule 2-lll(a)(4) was amended to permit an attorney to represent a client in cases where he/she may or will be called as a witness on behalf of the client in litigation concerning the subject matter of such employment if the attorney receives the client's written consent after the client has been fully advised of the possible implications of such an arrangement and the client has had a reasonable opportunity to seek the advice of independent counsel on the matter. Although such attorney-witness arrangements are permitted, the Comden Court's statement is no less applicable because of the change in the Rules of Professional Conduct. Attorneys who act both as witness and

advocate in proceedings before this Board must bear the risk of having their credibility questioned and being discredited. We find that the ALO acted properly regarding his credibility resolutions as to Mr. Hogan and Mr. Hipp.[8/]

Surface Bargaining

Based on the totality of the circumstances on the record as a whole, we find that Respondent had no real intention of bargaining with the UFW with the purpose of reaching an agreement.[9/] Respondent's conduct from the outset of negotiations prevented the parties from reaching an agreement on a complete contract. Respondent's claim of financial hardship in late October is not relevant to its actions prior to the time of the claim. Respondent's claimed inability to pay its employees higher wages than it was proposing at the bargaining table has no bearing on its failure to provide adequate and accurate information, its institution of unilateral wage increases, and its uses of other dilatory tactics in bargaining. Respondent's

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[8/] Respondent excepts to the ALO's total failure to credit any of Respondent's witnesses and his crediting of all of General Counsel's witnesses. This Board will not distrub an ALO's credibility resolutions unless the clear preponderance of the relevant evidence demons-rates that they are incorrect. The fact that an ALO credits one party's witnesses over another party's witnesses in not improper. (Andrews v. ALRB (1981) 28 Cal.3d 781; George A. Lucas and Sons, (Sept. 10, 1982) 8 ALRB No. 61; Adam Dairy dba Rancho Dos Rios (Apr. 26, 1978) 4 ALRB No. 24; El Paso Natural Gas Co. (1971) l93 NLRB 333 [78 LRRM 1250]; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531].) Our review of the evidence indicates that the ALO's credibility resolutions are supported by the record as a whole and we therefore affirm them.

[9/] Unlike the ALO, we do not rely on Respondent's statement in Robert H. Hickam, (July 17, 1978) 4 ALRB No. 48, that if he could he would rather not deal with the Union (again).

unilateral wage increases (see discussion below) appear to contradict its claimed financial hardship. In addition, the timing of Respondent's claim of financial hardship coupled with the stringent limitations as to who would be allowed to inspect its financial records strongly suggests that this defense is a ruse.[10/] Therefore, we affirm the ALO's conclusion that Respondent engaged in surface bargaining in violation of section 1153(e) and (a).[11/]

Unilateral Wage Increases

We affirm the ALO's finding that Respondent raised the wages of its employees without notifying and/or giving the UFW an opportunity to bargain about the changes. Respondent argues that the raises in June 1980 were effected pursuant to its past practice. The burden is on Respondent to prove that the increases were made in accordance with its past practice. (Joe Maggio, Inc.(Oct. 7, 1982) 8 ALRB No. 72; NLRB v. Allis-Chalmers Corp.(5th Cir. 1979) 601 F.2d 870 [102 LRRM 2194].) We find that Respondent has not met that burden. Respondent argues that its payment of $4.00 per hour to swampers was justified by a business necessity, the need to harvest its fruit, and therefore was not a violation of section 1153(e) and (a). The only evidence of business necessity is testimony by Respondent's negotiator,

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[10/] Respondent offered to "open" its financial records to the UFW after the Consolidated Complaint was issued alleging that Respondent unlawfully refused to bargain in good faith with the UFW and after the pre-hearing conference in this case.

[11/] Contrary to the ALO, we find that Respondent did not engage in regressive bargaining with regard to its September 24, 1980 Thompson seedless grape wage proposal.

Mr. Hipp, that he telephoned UFW negotiator, Ms. Miller, and told her that swampers would not work for less than $4.00 per hour. That evidence is insufficient to establish the business necessity defense. (See Joe Maggio, Inc., supra, 8 ALRB No. 72.)

We affirm the ALO's finding that Respondent denied the UFW post-certification access. In addition, we find that Respondent through its supervisor Hector Rodriguez, engaged in unlawful surveillance by following Ms. Miller when she tried to talk to workers on October 10. Ms. Miller's failure to notify and provide information to Respondent before attempting to take access was justified because of Respondent's repeated failure and/or refusal to provide the UFW with accurate employee lists, work schedules, and job locations; and because it engaged in other tactics which hindered the Union's ability to contact Respondent's employees. Respondent has not shown that Ms. Miller's access was in any way unreasonable or interfered with the employees' work.

In O.P. Murphy Produce Co., Inc. (Dec. 27, 1978) 4 ALRB No. 106, we held that a certified bargaining representative is entitled to take post-certification access at reasonable times and places for any purpose relevant to its duty to bargain collectively as the exclusive representative of the employees in the unit. Respondent contends that Ms. Miller was not entitled to take post-certification access because: (1) Respondent is not the employer of the harvest employees at El Dorado, and (2) since Respondent does not own or lease the El Dorado property, the UFW is not entitled to post-certification access to that property

without the permission of El Dorado's ranch manager. We find no merit to Respondent's exceptions.

In O. P. Murphy, supra, we found that:

> In its role as collective bargaining representative, the labor organization owes a duty to all the employees in the bargaining unit to represent them fairly. Wallace Corporation v. NLRB, 323 U.S. 248, 15 LRRM 697 (1944). This duty, which extends to the negotiation of contracts, cannot be discharged unless the union is able to communicate with the employees it represents. Prudential Insurance Company of America v. NLRB, 412 F.2d 77, 71 LRRM 2254 (2d Cir. 1969), cert, denied, 369 U.S. 928, 72 LRRM 2695 (1969). The ability to communicate during negotiations has been held to be 'fundamental to the entire expanse of a union's relationship with the employees.' Prudential Insurance Company of America v. NLRB, supra, at p. 84.
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> Communication between the union and the employees is also essential to the smooth functioning of the bargaining relationship between the union and the employer. If the union cannot easily contact the employees it represents, delays are likely to result, negotiations may flounder, and tentative agreements between the parties may be rejected by the unit employees. Accordingly, all parties benefit from the institution and maintenance of adequate communications between the bargaining representative and the employees it serves. (4 ALRB No. 106 at p. 4.)

The instant case presents a situation where the certified bargaining representative sought access to premises in which the employer has no legal ownership or leasehold interest. The employer has been given access to the property by the legal possessor(s) of the property in order to perform an agricultural service(s) within the definition of agriculture as set forth in section 1140.4(a) of the Agricultural Labor Relations Act.

Respondent seeks to narrow the definition of an employer's premises to property owned or leased by the agricultural employer. This would be contrary to the purposes of the Act and would

undermine the certified bargaining representative's duty to the members of the bargaining unit and interfere with the rights of farm workers guaranteed by section 1152 of the Act.

Section 1140.4(c) states:

> (c) The term 'agricultural employer' shall be liberally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agricultural employee, any individual grower, corporate grower, cooperative grower, harvesting association, hiring association, land management group, any association of persons or cooperatives engaged in agriculture, and shall include any person who owns or leases or manages land used for agricultural purposes
> . . . . .
> (Emphasis added.)

Harvesting associations, hiring associations and land management groups which fall within our term "custom harvester" in many cases do not own or lease the property on which they and their employees are engaged in agriculture. It was not the intent of the Legislature to limit the term "agricultural employer" only to persons or entities which own or lease land. The Legislature clearly intended agricultural employers to be subject to the provisions of the Act, regardless of whether they owned or leased land, or merely perform agricultural services through their employees, on land owned or leased by another person or entity.

Given the intent of the Legislature to include harvesting associations, hiring associations and land management groups within the definition of agricultural employers, we cannot narrow the meaning of the term "employer's premises" as it applies to our own access rules to include only that property which an agricultural employer leases or owns. The term "employer's premises" must be liberally construed to include the property or premises on which

an agricultural employer performs agricultural services and functions through one or more of its agricultural employees. That is, if the agricultural employer's employees are working on property in which the employer has no legal possessory interest, and the employees are on that property to carry out an agreement or understanding between the employer and the legal owner(s) or possessor(s) of the property, that property is deemed to be the agricultural employer's property or premises for the purpose of labor relations. The agricultural employees have a right to be on the property because the agricultural employer has a limited contractual possessory interest.[12/] We find that where agricultural employees are assigned to work on property not owned or leased by their agricultural employer, the certified bargaining representative is entitled to take post-certification access as set forth in our Decision in O. P. Murphy Produce Co., Inc., supra, 4 ALRB No. 106.

Therefore, we conclude that Respondent violated section 1153(a) of the Act by the conduct of its supervisor Hector Rodriguez in: (1) denying Ms. Miller, a UFW representative, access to the El Dorado Ranch for the purpose of discussing the contract negotiations with Respondent's employees, and (2) engaging in surveillance by following Ms. Miller around the field while she was attempting to talk to Respondent's employees.

[12/] Respondent's interest in the property is analogous to that of a license. The interest is not an interest or estate in land but, like a license, it confers on the agricultural employer a privilege to use the land for a specific purpose; i.e., to perform an agricultural service(s).

Discharges of Juan and Margarita Lopez

The ALO concluded that Respondent lawfully discharged Juan Lopez (Juan) for cause but unlawfully discharged Margarita Lopez (Margarita) because of her relationship to Juan. We conclude, contrary to the ALO, that Respondent unlawfully discharged both Juan and Margarita Lopez because they engaged in protected concerted activity.

Juan and Margarita Lopez began working for Respondent in 1973 and continued to do so until November 1980, when they were discharged. Neither Juan nor Margarita was ever criticized about their work performance and neither had ever received a warning about their work until November 1980, just before they were discharged.

In October 1980, Juan and Margarita complained to Hector Respondent's supervisor, about the condition of the portable toilet. There was only one toilet for 60 workers and it was dirty and there was no toilet paper. On November 3, Juan and Margarita refused to begin working until Hector talked to Robert Hickam about paying them $0.35 per box for the grapes they picked, rather than the $0.30 per box Hector told them they were going to get.[13/] Juan told Hector to talk to Robert Hickam about paying them five cents more. Hector talked to Robert Hickam and returned to tell them that Respondent would pay them $0.35 per box. Both Juan and Margarita worked the entire day and neither was criticized about

[13/] Juan and Margarita received $0.35 per box and $0.40 per box on October 30 and 31, respectively, when they worked for Respondent at El Dorado.

their work.

On November 4, Juan and Margarita were both warned by foremen Marquez and Olivera about throwing the grapes into the boxes, picking bunches that were too small and not packing enough grapes into the boxes. Olivera warned Juan three times and Margarita once before he fired them. Juan and Margarita continued to work after being told they had been fired. Olivera then got Hector, who also told the Lopezes they had been fired. After talking to Hector, the Lopezes continued to work, and finished the row of grapes they had been working on. Hector got their checks from Robert Hickam. Juan and Margarita were paid for all the boxes they picked that day although they had been fired earlier.

Respondent had an informal policy of requiring Hector and the other foreman to notify Robert H. Hickam concerning a possible discharge. On such occasions, Hickam would try to straighten out the worker himself before the discharge was effected. This policy was not followed in the Lopezes' case. Rather, Hickam made out Juan and Margarita's checks immediately after Hector fired them, thus implicitly approving their discharges without making any effort to investigate or resolve the problem.

It is clear that Juan and Margarita engaged in protected concerted activity the day before they were discharged. Respondent had knowledge of the protected concerted activity, and the timing of the discharge strongly suggests that protected concerted activity was the reason for the discharge. Neither Juan nor Margarita had ever been criticized about their work and had been picking grapes satisfactorily for Respondent for seven years, since

1973, and for a month during the 1980 harvest season before they were discharged. The only warnings they received were on the day they were discharged.

Respondent contends the Lopezes were discharged for causey i.e., poor work. Given the evidence on the record, we find that Respondent's proffered justification for the discharges of Juan and Margarita Lopez is pretextual and we therefore reject it.

We conclude that Respondent discharged Juan and Margarita Lopez because of their protected concerted activity and thereby violated section 1153(a) of the Act.

ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent Robert H. Hickam, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code section 1155.2(a), on request, with the United Farm Workers of America, AFL-CIO (UFW), as the certified collective bargaining representative of Respondent's agricultural employees.

(b) Failing or refusing in the course of collective bargaining to submit bargaining proposals with respect to its agricultural employees' wages, hours and other terms and conditions of employment.

(c) Granting unilateral wage increases to its agricultural employees without giving the UFW prior notice and an

opportunity to bargain about such wage increases.

(d) Failing or refusing to furnish relevant information to the UFW, at its request, for the purposes of collective bargaining, including but not limited to, personnel, crop, and production information.

(e) Denying UFW representatives access to bargaining unit employees, at reasonable times, on the property or premises where they are employed, for purposes related to collective bargaining between Respondent and the UFW.

(f) Failing or refusing to give timely and accurate information to the UFW with respect to the job assignments and places of employment of Respondent's agricultural employees.

(g) Engaging in surveillance or in any other manner interfering with UFW representatives' attempts to communicate with Respondent's bargaining unit employees, at reasonable times, on the property or premises where they are employed.

(h) Discharging or otherwise discriminating against agricultural employees because they engaged in protected concerted activity.

(i) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of the rights guaranteed them by section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified collective bargaining representative of its agricultural employees at reasonable times

and places to confer in good faith and submit meaningful proposals with respect to its employees' wages, hours and other terms and conditions of employment, and if an understanding is reached, embody such an understanding in a signed agreement.

(b) Furnish relevant information to the UFW, upon request, for the purpose of bargaining, including, but not limited to, personnel, crop and production information and information about work assignments and work locations of Respondent's agricultural employees.

(c) Permit UFW representatives to meet and talk with Respondent's agricultural employees on the property or premises where they are employed, at times agreed to by Respondent or, in the absence of such an agreement, at reasonable times, for purposes related to collective bargaining between Respondent and the UFW.

(d) Upon request of the UFW, rescind the unilateral wage increases which Respondent implemented (1) in June 1980, to its steady employees? (2) on or about July 14, 1980, for general laborers; (3) on or about October 1, 1980, for the Thompson seedless grape harvesters; (.4} on or about October 15, 1980, for the Malaga grape harvesters; (3) on or about October 17, 1980, for the swampers in the Emperor grape harvest; and (6) on or about October 30, 1980, for the Emperor grape harvesters.

(el Immediately offer Juan Lopez and Margarita Lopez full reinstatement to their former jobs or substantially equivalent employment, without prejudice to their seniority or other employment rights and privileges, and make them whole for all losses of pay and other economic losses they have suffered as a result of

their discriminatory discharge, the reimbursement amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(f) Make whole all of the agricultural employees who were employed by Respondent at any time between March 3, 1980, and March 10, 1981, the last day of the hearing and from March 11, 1981, to the date on which Respondent commences good faith bargaining with the UFW, which leads to a contract or a bona fide impasse, for all losses of pay and other economic losses sustained by them as a result of Respondent's refusal to bargain, the amounts of the awards to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(g) Preserve and, upon request, make available to the Board or its agents for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay and makewhole period and the amount of backpay and makewhole due under the terms of this Order.

(h) Sign the attached Notice to Agricultural Employees and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(i) Mail copies of the attached Notice, in all

appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from March 3, 1980, until the date on which said Notice is mailed.

(j) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(k) Provide a copy of the attached Notice to each employee employed by Respondent during the twelve-month period following the date of issuance of this Order.

(1) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in all appropriate languages to the assembled employees of Respondent on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and during the question-and-answer period.

(m) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps

which have been taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with the terms of this Order.

IT IS FURTHER ORDERED that the certification of the UFW, as the exclusive collective bargaining representative of Respondent's agricultural employees, be extended for a period of one year from the date on which Respondent commences to bargain in good faith with the UFW.

Dated: December 29, 1982

ALFRED H. SONG, Chairman

HERBERT A. PERRY, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges filed in the Delano Regional Office by the United Farm Workers of America, AFL-CIO (UFW), the certified bargaining representative of our employees, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by changing your wages without first notifying and/or bargaining with the UFW, by refusing or failing to bargain in good faith, by failing or refusing to provide information requested by the UFW relevant to contract negotiations, by denying UFW representatives access to work sites so they could talk to our employees about contract negotiations and by discharging two employees because they engaged in protected concerted activity. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board?
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT make any changes in your wages, hours, or working conditions without first notifying and bargaining with the UFW.

WE WILL NOT deny UFW representatives their right to talk to our employees at reasonable times on property where our employees are working.

WE WILL NOT discharge or otherwise discriminate against any of our agricultural employees because they have engaged in protected concerted activity.

WE WILL give information relevant to our negotiations to the UFW when they request it.

WE WILL meet with authorized representatives of the UFW, at their request, for the purpose of bargaining and reaching a contract covering your wages, hours, and working conditions.

WE WILL reimburse all of our present and former employees who suffered any losses of pay or any other economic losses as a result of our failure to bargain in good faith with the UFW, plus interest.

WE WILL offer Juan Lopez and Margarita Lopez reinstatement to their former jobs or substantially equivalent jobs and will pay them any money they lost, plus interest, because we discharged them unlawfully.

Dated: ROBERT H. HICKAM

By: _____
Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 1685 E Street, Fresno, California, 93706. The telephone number is (209) 445-5591. Another office is located at 627 Main Street, Delano, California, 93215. The telephone number is (805) 725-5770.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Robert H. Hickam
(UFW)

8 ALRB No. 102
Case Nos. 80-CE-105-D
80-CE-165-D
80-CE-195-D
80-CE-207-D

ALO DECISION

The ALO concluded that Respondent was the agricultural employer of the agricultural employees on his payroll who worked on property solely owned or leased by him and who worked on property not solely owned or leased by him with a few exceptions where the ALO found he had no control over the employees' wages, hours, and working conditions.

The ALO concluded that Respondent violated Labor Code section 1153 (e) and (a) of the Act by its refusal and/or failure to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW), the certified collective bargaining representative of its agricultural employees. Respondent also violated section 1153(e) and (a) by giving its employees wage increases without first notifying and giving the UFW an opportunity to bargain about them. Respondent violated section 1153(a) by denying access to a UFW representative when she tried to contact workers prior to the start of work to discuss the contract, negotiations with them, and by its engaging in surveillance of the UFW representative when she attempted to talk to workers about the contract negotiations.

The ALO concluded that Respondent did not violate section 1153(a) by its discharge of Juan Lopez on November 4, 1980, but violated 1153(a) by its discharge of Margarita Lopez at the same time. The ALO found that Juan was discharged for cause, poor work, and for refusing to respond to criticisms of his poor work, but that Margarita was discharged because of her relationship to Juan and not for cause.

BOARD DECISION

The Board concluded that Respondent is the agricultural employer of all agricultural employees on its payroll. Although Robert H. Hickam testified that he had no control over the work performed by employees in some instances, there is insufficient evidence on the record to show that Respondent was not their agricultural employer, as the record strongly suggests that Respondent exercised control over those employees on its payroll in all aspects of their employment. Respondent's agricultural business, taken as a whole, is that of a custom harvester-packer. Respondent's refusal to provide the UFW with information it requested about employees who worked on property not solely owned or leased by Respondent; and crop and production information concerning those properties violated sections 1153(e) and (a) of the Agricultural Labor Relations Act.

The Board refused to reprimand the ALO for his statement regarding both of Respondent's counsels who also acted as Respondent's negotiators and were principle witnesses in this case. "An attorney who attempts to be both advocate and witness impairs his credibility as witness and diminishes his effectiveness as advocate." (Comden v. Superior Court (1978) 20 Cal.3d 906.) We find this statement applicable to the Board's proceedings.

The Board affirmed the ALO's conclusion that based on the record as a whole, Respondent engaged in surface bargaining in violation of section 1153(e) and (a). Respondent's claim of financial hardship was not a legitimate defense to the violation given the circumstances in this case.

The Board affirms the ALO's conclusion that Respondent violated section 1153(e) and (a) of the Act by unilaterally increasing the wages of its agricultural employees without giving the UFW piror notice to and an opportunity to bargain about the increases. Respondent's defenses of past practice and business necessity were rejected as not supported by the record.

The Board affirmed the ALO's conclusion that Respondent denied the UFW post certification access and, through its supervisor Hector Rcdriguez, engaged in unlawful surveillance of a UFW agent while she attempted to talk to workers about contract negotiations.

The Board found no merit in Respondent's defense that the UFW had no right to take access to the property because Respondent did not own or lease the property. The UFW has the right to take access for any purpose related to its duty to bargain collectively as the exclusive representative of the employees in the unit wherever those agricultural employees are assigned to work by the agricultural employer regardless of whether or not the property is owned and/or leased by the agricultural employer.

The Board concluded that Respondent violated section 1153(a) of the Act by discharging Juan Lopez and Margarita Lopez because they engaged in protected concerted activity.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

* * *

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: ROBERT H. HICKAM, Respondant and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party	Case Nos. 80-CE-105-D 80-CE-165-D 80-CE-195-D 80-CE-207-D DECISION OF THE ADMINISTRATIVE LAW OFFICER

Appearances:

Judy Weissberg, Esq., for
the General Counsel;

Littler, Mendelson, Fastiff, & Tichy by
Michael Hogan, Esq.,
and Spencer Hipp, Esq.,
for the Respondant;

Deborah Miller, for the United Farm Workers of America, AFL-CIO, Charging Party

Before: Leonard M. Tillem,
Administraive Law Officer

PREFACE

References to the record are to be read as follows: "GC" followed by a number, or "R" followed by a letter are references to, respectively, General Counsel's and Respondant's exhibits. For example, GC-3:60 means General Counsel's exhibit number three, page 60.

References not preceded by "GC" or "R" are references to the hearing transcript. For example, 2:99 means volume II, page 99 of the hearing transcript

I

STATEMENT OF THE CASE

This case was heard before me in Delano and Fresno, California, on November 12, 13, 14, 17, 18, and 19, December 3, 4, 5, and 15, 1980, and January 7, 8, 15, and 16, and March 2, 3, 4, and 10, 1981. The hearing was held pursuant to the complaint issued by the Fresno Regional Director on August 8, 1980, upon an unfair labor practice charge (80-CE-105-D) filed by the Charging Party, the United Farm Workers of American (hereinafter UFW).

The complaint alleges that Respondent Robert H. Hickam refused to bargain collectively in good faith with the certified bargaining representative of his employees the UFW, in violation of Section 1153(a) and (e) of the Agricultural Labor Relations Act (hereinafter ALRA or Act). Before the start of the hearing, the complaint was twice amended: once on October 7, adding additional charges by the UFW of violation of Section 1153(a) and (e) of the Act (80-CE-165-D); again on November 7th to correct an error in the first amended complaint. During the hearing, the complaint was amended further, to add charges by the UFW of additional violations of Section 1153(a) and (e) of the Act and of violation of Section 1153(c) of the Act. This was done pursuant to a motion filed by General Counsel with the Hearing Officer and served on the Respondent on November 17, 1980.

The entire complaint was based upon charges filed by the UFW on July 15, August 22, October 17, and November 12, 1980. Copes of the charges and the amended charges were served on the Respondent.

Upon the entire record, including my observations of the demeanor of the witnesses, and the reading and consideration of the

briefs filed by the parties, I make the following findings of fact, conclusions of law, and determinations of relief.

II

FINDINGS OF FACT

A. Jurisdiction of the Board.

R. H. Hickam owns farm land in Tulare County, California, upon which he grows table grapes, wine grapes, plums, peaches, nectarines and persimmons. He sells to a nation-wide market through a shipper, Mendelssohn-Zeller, which is based in San Francisco. R. H. Hickam is an agricultural employer within the meaning of Section 1140.4 (c) of the ALRA. The Respondent admitted this in paragraph II of his Answer. I find that the employees on Hickam's land are agricultural employees within the meaning of Section 1140.4(b) of the ALRA. I find that the UFW is a labor organization within the meaning of Section 1140.4(f) of the ALRA.

B. Custom Harvester Issue.

1. Introduction

The membership of Hickam's bargaining unit had never been disputed until negotiations between Hickam and the UFW commenced. At this hearing the issue as to which employees belonged to the bargaining unit was hotly contested. Hickam claims he is the agricultural employer only of those employees who work on land solely owned or controlled by himself. The UFW and General Counsel alleged that Hickam is the agricultural employer of all those agricultural employees who are on Hickam's payroll. Hickam, by himself, owns or controls approximately 260 acres of farm land with a peak work force of approximately

35 employees.

Hickam however pays employees for work done on approximately 1,000 acres of land owned by others. The peak force for those 1,260 acres is approximately 150 employees. Since the amount of any relief given in this case, as well as any relief given pursuant to the relief ordered for Hickam's bargaining unit employees in 4 ALRB No. 73, may depend on the answer to this question, it must be dealth with first

2. Property Owned Outright or Leased Solely by Hickam

Since the UFW was certified in July 1977 as the exclusive bargaining agent for Hickam's agricultural workers, Hickam has owned or leased six parcels of land, which he solely controlled and upon which he grew crops. Hickam has owned the Kameo, Rowley, Young, and Nelson Ranches since prior to 1977 (1:44-49). He lives on the Kameo Ranch and operates a packing house on the Rowley Ranch (1:44-49). He has leased, under an oral lease, the property known as "The Vineyard) since before 1977 (1:49-50). Hickam's rent on The Vineyard is one-half of the harvest there. However, Hickam is in sole control of The Vineyard operations.

He owned the Griggs Ranch from February 1978 to March 1979 (1:57-59). These lands, excluding the eighty acre Griggs Ranch, total 262 acres (1:44-59). The crops on these lands include oranges, peaches, plums, persimmons, nectarines, lemons, Christmas trees, and approximately 200 acres of grapes (1:44-59). The grapes consisted of Emperors, Ribiers, Red Malagas, and Flame Seedless (all table grapes), and Thompson's (a juice, or wine grape) (1:44-59).

Hickam performed all necessary operations on these lands at his own expense. He provided all the necessary equipment.

Hickam over-saw and directed his supervisors and employees in the activity on these lands. It is Hickam's contention that only the workers on these lands are the employees which are represented by the UFW.

3. Property in which Hickam Has a Partnership Interest

A. H&M

In April 1978, Hickam and Andrew Marincovich formed a partnership known as H&M, which purchased 240 acres of orange groves near Exeter, in Tulare County. Each partner owned an equal share. There was no written partnership agreement (1:59-61). The ranch came with a "manager", Claude Miller, who had been working that grove since 1955, and had managed it under its prior owner, Mr. Dobson[1] (16:42-43).

Although Hickam and Claude Miller both testified that it was Miller that made the decisions at H&M (1:69-71; 17:43-49), the testimony is not convincing. Miller receives only $600.00 per month for his alleged services as a manager (GC-3:80, 83,84, 86, 87, 89, 90, 115, 118, 120, 121, 124, 126, 127); the normal fee for ranch manager is $5.00 to $7.00 per acre per month (5:81). For the 240 acres of H&M, this would be $1,200.00 to $1,680.00 per month. Moreover, Miller testified that he consulted Hickam and Marincovich, the partners with respect to anything important (16:42-48). Hickam testified that he "advises" Miller with regard to pruning (5:42-44; 1:70), pesticide spraying, fertilizing, timing of work to be done on crops, and weed aisling, and other "major operations" and with respect to problems (1:69-72).

[1]There was no testimony as to Miller's duties or responsilities under Dobson. He was merely referred to as a "manager".

These would seem to be the kind of routine farming operations a manager would be paid to make by himself. Thus, Claude Miller seems rather to have been a supervisor with a degree of independence, but not a manager with full decision making authority. And in any case, it is highly likely that one would tend to defer to the judgment of a 50% owner/farmer? especially an experienced farmer. Hickam has had Claude Miller, the H&M "manager", direct work on Hickam's Young Ranch (5:26-27).

Hickam also supplied the equipment used at H&M, and often included men to run that equipment (GC-3:114, 79; 3:152; 3:119), because, as he testified, they did not have their own equipment (2:152; 3:119). Hickam paid the men from his payroll account and then charged H&M for the use of the men and equipment (GC 3:79, 114).

Hickam's pruning crew pruned H&M trees, and was paid by Hickam (GC-3:121; 5:42-44). The employees on Hickam's land who were familiar with drip irrigation systems were also paid by Hickam to repair the H&M drip system (5:25-26; GC-12:2).

In fact, Hickam paid the entire payroll for all activities on H&M (GC-3:79, 80, 81, 83, 84, 86, 87, 89, 90, 114, 115, 118, 119-22, 124, 126, 127), except the harvest. Harvest expenses were entirely borne by a packing company, Tenneco West or Woodlake Packing. These companies make the decision when to harvest, and use their own employees and equipment for the harvest operation (1:72; 16:44). Hickam was reimbursed by H&M for all of his expenditures. Additionally, Hickam provided payroll services, although his partner, Marincovich, is a CPA living in Long Beach, and heads a large accounting firm which, presumably could do it. (3:94-95).

Hickam's credit at local businesses was available to H&M and he authorized H&M employees to make purchases for H&M on his account. (GC-3:75, 79, 80, 81, 83, 84, 86, 87, 89, 90, 114, 115, 118, 120-22, 124, 126, 127; 2:151, 153; 3:101, 124). Hickam paid the bills as they became due and charged H&M for the expenditures (Id). These purchases were for ranch necessities, such as for machine parts, lumber, and welding.

In June 1979, H&M was sold to Lawrence Zuanich (also known as Shazu},a Fort Lauderdale, Florida, fisherman (1:61, 99). Shazu leased the property to a new partnership, HMZ.

B. HMZ.

The partners of HMZ[2] are Hickant, Marincovich, and Zuanich. They are equal partners (1:61-62). HMZ leased the 240 acres of oranges sold by H & M to Zuanich, and bought 160 acres of "bare" land (with barley on it) between Exeter and Lindsay (1:61-64). The 160 acres were planted in early 1980 with Emperors and Flame Seedles grapes, which are currently too young to produce (1:62-63). Claude Miller was retained as "manager" of HMZ at a maximum salary of $800.00 per month (1:69, 98; GC-3:3-17, 19-22, 27-29, 31, 33, 34, 38, 39, 71, 73-77, 79). Samuel Davila, a son-in-law of Zuanich, lived on the land and has been employed by HMZ since 1979, at $650.00 per month (GC-3:3-17; 19-22, 27-29, 31, 33, 34, 38).

The ultimate authority at HMZ is the three partners, who appear to make decisions by concensus (1:99). However, Hickam is the only farmer, and the only partner who lives in the area. Marincovich is a CPA, and lives in Long Beach. Zuanich is a fisherman, and lives in Florida. (1:99-100). Although both make periodic visits, they undoubtedly must rely heavily on Hickam's reports and advice. Hickam's statements to the contrary are unconvincing. I found Hickam to be fully aware of the custom harvester issue and ramifications. His testimony was self servicing and less then credible.

Claude Miller, the alleged manager of H & M was retained as the "manager" of HMZ at a salary that reached $800.00 per month in June 1980? it had previously been $600.00 per month (GC-3:3-17, 19-22, 27-29, 31, 33, 34, 38, 39, 71, 73-77, 79). At the normal managers rate of $5.00 to $7.00 per acre per month (5:81), a manager of HMZ's

[2]HMZ is referred at times in the record as Shazu.

400 acres would receive $2,000.00 to $2,800.00 per month. Hickam testified that he "advised" Claude Miller with regard to pesticide spraying, festilizing, timing of work, and cultivation of the HMZ properties (1:69-72), and with regard to the number of employees necessary for specific work (1:101-02; 2:29). These appear to be the sort of routine ranch operations that a true manager would have final authority over. Yet, Hickam testified that he reviews the work, generally, on HMZ "every once in a while", and the grapes more often (1:71, 100). If Miller had any problems, he came to Hickam for advice (1:100-101).

Miller's true status is reflected in Hickam's revealing statement that "I turn him loose on their own initiative and I kind of oversee it and if it is not done right to suit me or the way I think the partners want it done I say something." (1:101). Miller appears to have been merely a supervisor who is given a relatively high degree of independence rather than a manager. There is no evidence that Davila had independent authority of any kind. Hickam appears to have had effective control of day to day HMZ operations.

The work at HMZ is done by employees on Hickam's payroll (GC-3:17, 19-22, 27-29, 31, 33, 34, 38, 39, 71, 73-77, 79). These include Hickam's steady or individual employees (2:18, 20, 23, 29, 63-66, 77-78, 80, 150-53; 4:57-58; 5:32-33; GC-3:3, 4, 7, 13, 14, 21, 22, 34), and Hickam's crew employees under Hickam supervisors, Hector Rodriquez and Gloria Verdin (2:17, 28-29, 80; 4:57-58; 5:60-62; GC-3:3, 4, 6, 7, 9, 12, 13, 14, 19). Crews under Hickam's supervisors planted HMZ's grapes (4:57; GC-3:4, 7, 9, 14, 19). Hickam handles the payroll for all of these employees; even though his partner, Marincovich, has

been a CPA for approximately 30 years and runs a Long Beach accounting firm (3:94-95), and is presumably better equipped to do it.[3] Hickam charges HMZ for these expenditures (GC-3:3-17, 19-22, 27-29,.31, 33, 34, 38, 39, 71, 73-77, 79).

Hickam provides much of the equipment and materials used by employees at HMZ, including fuel (2:22-23, GC-3:5, 8, 10, 16, 27), tractors and tractor implements (2:76; 4:56-58; 2:80, 150-153; GC-3:8, 10, 27, 33, 75, 76, 79). He sold the cuttings he grew for HMZ that were eventually planted on the HMZ vineyard (2:30-31, GC-3:17). Hickam made his credit with local businesses available to HMZ, and HMZ employees were authorized to charge HMZ purchases to Hickam's account (2:60-64, 153; 4:58-59, GC-3:16, 20, 29, 31, 38, 39, 73, 74, 77). Hickam paid these bills as they became due and charged HMZ for them. Hickam also charged HMZ a "rental on the equipment he provided to HMZ.

4. Property In Which Hickam Has No Ownership Interest.

A. El Dorado.

El Dorado consisted of 400 acres, on which are grapes, including Emperors, Thompsons, Almerias, Calmerias, and Carriagains, and plums. The property is located between Exeter and Lindsay and is owned by five shareholders, Marincovich, Zuanich, Zisless, Gilson and King. Zisless neither lives in California, nor is a farmer. Gilson too lives outside California and is a manufacturer. King, a Vice-President of Star Kissed Tuna, "probably" lives in California. (2:67-70).

Crews paid by Hickam have picked and packed El Dorado's grapes since approximately 1970 (3:87). Hickam assumes that he will

[3]In the Fall of 1980, as this hearing was imminent, Marincovich did arrange to take over HMZ's payroll (2:14).

do this every year unless told otherwise (3:48-49). El Dorado crops account for most of Hickam's picking and packing activites[4] and Hickam's packing income will be substantially reduced were it not for El Dorado business (3:56-57). During the 1977 to 1980 period, Hickam has also paid his own steady employees, individual employees, or crew employees and foreman of the crew (18:25-26, 28, 32, 50) to prune plums (2:70; GC-3:23), plant grapes (7:92-94; 18:26; GC-3:82), prune grapes (GC-3: 169-70), operate equipment (GC-3:82), repair equipment (GC-3:134), as well as pick, haul, and pack grapes (GC-3:40-46, 93-96, 142-47). Some of Hickam's employees also testified they did suckering and deleafing work at El Dorado while working for Hickam under Hickam supervisors, at Hickam's direction 7:90-91; 18:28-29, 49, 50).

Hickam charges El Dorado for these payroll expenses. Hickam does this payroll, and makes all necessary deductions, even though one of the El Dorado owners, Marincovich, has been a CPA for approximately 30 years, and runs a well-established accounting firm in Long Beach (3:94-95). Marincovich has done much of El Dorado's payroll since approximately 1976 (16:133-34), and all of it since late 1980 (3:68). Hickam's explanation that El Dorado was not equipped to do the payroll any earlier is not convincing.

Hickam managed El Dorado from 1970 to 1976 (4:83). In December, 1974, El Dorado hired Mark Watte to manage El Dorado properties (4:83; 16:13). Hickam was retained to train Watte, and kep authority over ranch operations until early 1976. (4:83-85). Mark Watte was replaced in November 1979 by his brother, Bryan Watte and Joe Golonsky. Since 1976, Hickam has continued to influence and direct

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[4]The packing shed operation is described at length in §C following.

some of El Dorado's routine activities. He provides and directs employees in routine farm operations on El Dorado (see discussion above). Hickam participates in the decision of when to begin picking at El Dorado, apparently having the final say in order to coordinate the picking with the packing house (2:122-23; 3:109). Hickam provides all of the equipment necessary for the harvest at El Dorado (16:26-27; 2:125-26). Mark Watte's testimony that he was the one who made the decisions at El Dorado (16:12-42) does not detract from the obvious power of Hickam to effect El Dorado operations.

Moreover, it is undisputed that employees harvesting at El Dorado in October, 1975, voted in the Hickam representation election of that month. Hickman made no protest or challenges on this ground, (7:98-101; GC-33, 34), nor asked for a clarification of the bargaining unit (8:162).

B. Hubert "Dean" Wyrick.

Wyrick is one of Hickam's steady employees (2:74). He owns 35 acres of Thompsons, Emperors, and Almerias adjacent to Hickam's property (2:74-75). Hickam has packed Wyrick's grapes since approximately 1970 (4:88).

From 1977 to 1980, Hickam has paid all employees working on Wyrick's land from his payroll account for services such as pruning, suckering, picking, hauling and packing (GC-3:25, 35, 47-49, 78, 85, 108-110, 131, 162, 163, 167). These employees often include Hickam's steady employees, and individual and crew employees, who, although they are often contacted directly by Wyrick, (8:6), are directed to go to Wyrick's by Hickam and work under Hickam's supervisors (2:80-81, 118-19;

3:117-18; 4:107-108; 5:8). Hickam charges Wyrick for these expenditures.

Hickam also provides Wyrick with equipment (5:5-14) and charges Wyrick a "rental" for this (Id; 4:22-23; 2:127, 31; 3:2-3; GC-8.

Hickam participates in the decision as when to harvest Wyrick's grapes (3:48; 3:104). Although Wyrick has his own view when to pick, which Hickam defers to whenever possible, Hickam makes the final decision concerning picking in order to coordinate the harvest with his packing house (2:124-125; 3:47, 48, 102-104). Hickam sends in the crews when he is ready (2:118-19; 3:118). (emphasis my own).

C. Poxin Ranch

Poxin consists of approximately 50 acres of table and juice grapes. It is managed by Louis Weissenberger, who also lives there, (2:108; 4:90). Hickam has provided Poxin with picking services; once in the 1977 season and once again in 1978. There is no evidence that he ever packed or hauled Poxin grapes (4:105; 5:38-39; GC-131; 5:47).

The decisions of Poxin were apparently made by Louis Weissenberger. The 1977 harvest was already under way, without Hickam's assistance, when another of his crops matured. Unable to find workers to harvest both crops at once, Weissenberger contracted his Malaga harvest to Hickam, who, up until then, had apparently not been involved with Poxin (4:105-106; 5:38-39). In 1978,Hickam picked some of Poxin's juice grapes with his own crew and equipment, and leased Poxin some equipment (5:47). In 1977, Hickam sold Poxin's grapes under an especially good contract he had with a winery (5:39). He deducted a cost per ton to cover his expenses plus a profit, and forwarded the rest of the proceeds to Poxin (5:38-40).

Hickam paid the employees he sent to work on Poxin on Hickam payroll checks. He made all the deductions and paid the payroll taxes. (GC-10, 14, 18, 25). There is no evidence that Hickam ever billed Poxin for these expenses.

D. Mountain View Ranch (Grewal Bros.)

Mountain View is located near Exeter; it produces table grapes (Emperors) and nectarines on 58-1/2 acres (2:137-139). It has been owned since 1978 by the Grewal Bros. (2:137-39), one of whom lived in San Diego, the other in Exeter. The Exeter brother and

his wife were killed in a car crash in 1979, leaving an 18 year old son. The property has since been sold (3:111-112).

For six months in 1978 (March to September), Hickam managed Mountain View, and as manager, made all day-to-day decisions; receiving a $3.00 per acre per month fee for this. It appears Hickam actually controlled day-to-day operations at Mountain View for all of 1978, since the Exeter Grewals died just as harvesting was beginning. Hickam then controlled the harvest and post-harvest (3:112). He supplied all equipment and labor. This included his steady, individual and crew employees, and foremen, doing cultivation, tractor work, pruning, dusting, weed control, fertilizing, irrigation, and deleafing (hedging) (3:121-125; 4:27-28, 61, 62; 5:22-23, 41-42; GC-3:116, 119, 123, 125, 128, 129). Hickam paid the employees on his payroll account, and billed the Grewal Bros, for these expenditures for labor and equipment, and was paid by them (GC-3:116, 119, 123, 125, 128, 129).

Employees paid by Hickam, under foremen paid by Hickam,and with Hickam's equipment, have also done pruning (both grapes and nectarines) and deleafing before and since Hickam was manager of Mountain View. Hickam billed Mountain View/Grewal Bros, for the expenditures involved (5:28; GC-3:56, 59, 130). The only foremen ever named at Mountain View were Hector and Gloria (3:122, 131; 5:41). There is no evidence as to who decided these operations were necessary. Hector stated that although he remembered working at Mountain View/Grewal he was not aware of who the owners or managers were; the only thing he was sure of was that he worked for Hickam (7:49-52).

This incidentally was his recollection as to his status at Howard Raineys, Jack Griggs, Victor Glaze, Poxin, Gerald Nelson, Zucca

Farms, Bruce Myers, Goya and M&B. (Id)

The decision when to pick at Mountain View seems to have been made by Hickam (3:130-31). Hickam then sent in his crews under Hector or Gloria (Id). Hickam packed Mountain View grapes in 1977 through 1979 (GC-3:56-59, 97 - 99, 160-61). He providedhis own crews under his own supervisors, and all the necessary equipment for the harvest (Id; 3:130-31; 3:112; GC-3:56-59, 97-99, 160-61).

The employees at Mountain View apparently reported their working hours directly to Hickam, not to the Grewals (2:141). Hickam paid the employees from his payroll checks after making all required deductions and paying all the required payroll taxes. He then billed Mountain View for this. (GC-3:56-59, 97-99, 116, 119, 123, 125, 128-30, 160-61; GC-10-17; GC-18-21; GC-25-28).

E. Howard Rainey

Rainey's ranch is between Exeter and Lindsay. He grows oranges, plums, and about 12 acres of Calmeria grapes. Rainey is retired and lives in Visalia. His son lives on the ranch. (2:10; 3:13; 2:134). In 1980, Hickam was asked to manage some of Rainey's farm property and refused (4:28-29).

In 1980, Hickam supplied a supervisor (Hector) and crew to do deleafing at Rainey's (2:6-10; GC-3:2). The employees' time was reported directly to Hickam by Hector (Id). Hickam paid all of these employees and Hector's, from his payroll account, and billed Rainey for the costs (Id). The same is apparently true of a pruning crew under Hector in 1980 (GC-3:26). There is no evidence in the record who made decisions with respect to these operations.

Hickam has picked and packed Rainey's grapes since 1976 (4:88; 3:88). The decision as to when to pick is made jointly by

Hickam and Rainey. Rainey contacts Hickam when he thinks his grapes are ready. Hickam checks the color and chooses the exact time so as to best coordinate the harvest with his packing house operation (2:123-25, 134; 3:118-120). Hickam sends in the crews when he thinks it is the best time (7:18). These crews are supervised by Hector , who takes orders from Hickam (Id). Hickam supplies all the equipment used and assumes responsibility in harvesting Rainey's grapes, from picking through packing, and hauling to cold storage (2:134-35).

The employees involved are all paid by Hickam from his payroll account. Hickam pays all payroll taxes and makes all necessary deducstions. The times are reported directly to Hickam by his supervisors (2:6-10). Hickam then bills Rainey for these expenses, sometimes adding a 5% to 7% accounting fee (Id; GC-3:2, 26, 52-53, 111-113, 158-159, and November 18, 1980 (no page number); GC-4, 10-17, 18-21, 25-28).

F. John Morton (William Horton)

Morton owns 20 acres (including 8 of Thompsons and 4 of Emperors) adjacent to Hickam's property. (2:71, 103). Horton owned it in 1977 and sold it to Morton in 1979 (3:128-29). Morton is in the construction business (2:52).

Hickam has provided his individual and crew employees to do vine tying and tree thinning and pruning for Morton in 1980. (2:72; GC-3:24? 5:57-59). In 1979, Hickam sent in a crew under Hector to do deleafing (2:143-44). A crew under Hector may have planted grapes for Morton in 1980 (5:57-58). All of these employees were paid by Hickam on Hickam's payroll checks. Hickam made all the necessary deductions and paid all the payroll taxes. He then billed Morton for these expenses. (GC-3:24, 62-66, 151-53; GC-4, 10-21, 25-28).

Hickam has twice picked and packed Morton's/Horton's grapes; in 1977 and in 1979. (GC-3:62-66, 151-53; 4:90). The decision as to when to pick was made jointly by Morton/Horton and Hickam. Horton told Hickam when he thought the grapes were ready. Hickam then made an independant evaluation, confirmed the earlier decision and sent in his crew under Gloria or Hector in order to coordinate with the packing house. (3:129-30). Hickam provided all the necessary equipment for the harvesting, controlled the crop from the start of the harvest until it reached cold storage after packing (Id).

Hickam paid all the harvest employees from his payroll making the necessary deductions and paying the necessary payroll taxes. He then billed Morton/Horton for these expenses (GC-3:62-66, 151-53).

G. M&B

M&B is a partnership in which John Morton is a partner; the other partner was never identified (2:51-52). The evidence indicates that all of M&B is planted with new grapes, and that it has not yet produced a harvest (4:91).

Crews under Hector planted M&B's grapes in 1980. Hector was apparently contacted by Morton at HMZ where Hector was already doing planting, and arranged for Hector to plant M&B. Morton then arranged for Hickam to pay the crew with his payroll (2:52-53? GC-3:18). A crew under Hector did deleafing on M&B in 1979. This was apparently done on Morton's orders (2:144; GC-3:67). It is unclear as to who made the decisions to do these operations. The employees and foremen on both of these operations were paid by Hickam from Hickam's payroll account. Hickam paid all payroll taxes and made all necessary deductions. (GC-3:18, 67; GC-12, 16, 20, 27).

H. Victor Glaze

Glaze, a farmer, owned 30 acres of Emperors near Hickam's land in Exeter (2:78-79). He pulled his grapes out in 1979 (Id).

In 1979, Glaze asked Hickam if he had any one who could cut wire (necessary to pulling vines). Hickam sent over two of his individual employees to do it (4:109). Hickam paid these employees and made all the necessary deductions and paid all payroll taxes. He then billed Glaze for the expenses (GC-3:32).

Hickam has picked and packed Glaze's only one year; only 1979 (4:88). Glaze asked Hickam if he could do it. Hickam sent in Hector with a crew. Hickam provided all the necessary equipment and

was responsible for the grapes from harvest, through packing, to cold storage. (2:142-143). Hector and his crew were paid by Hickam. Hickam billed Glaze for the expense (GC-3:60, 61).

There is no evidence of any other links between Hickam and Glaze.

I. Griggs Ranch (Louann Gilbert/James Griggs)

Griggs owns approximately 10 acres of Emperors near Hickam's property (2:128-129). Griggs' daughter, Louann Gilbert, apparently handles business for Griggs (billings are often in her name: e.g. GC-3:50).

Griggs sells his grapes on the vine, and Hickam picks and packs them (2:132-133). Hickam has picked, hauled, and packed Griggs' grapes since approximately 1977 (4:88). There is no evidence as to who makes the picking decision at Griggs. Presumably Hickam decides the exact time to pick in order to coordinate this activity with his packing house (2:123-125). Hector's crew picks the grapes (5:45). It is uncertain who sets the pay rate, but it appears that Hickam had some influence over them (5:45-46). Hickam did provide all necessary equipment for the harvest operation (3:115, 128).

Hickam pays the harvest employees from his payroll account. He then bills Griggs for these expenses (GC-3:50-51, 103-105, 148-150).

There is no other evidence connecting Griggs to Hickam.

J. Goya Ranch

Goya Ranch is located near Lindsay, approximately 10 miles from Exeter. It is owned by Mrs. Goya, a widow, who lives in Southern California. It consisted of approximately 20 acres of

Emperors. The grapes were pulled in 1980. (2:144-148).

Hickam's only contact with Goya was picking, packing, and hauling of their grapes in 1979. (Id; 4:88). The Goya manager contacted Hickam and asked Hickam to pick the grapes. Hickam sent in a crew under Gloria, with all the necessary equipment. He then hauled the grapes to his packing house and packed them. (2:144-48). There is no evidence who decided exactly when to pick. I presume Hickam did, in order to coordinate the harvest with his packing operation. (2:123-125).

These employees and Gloria were paid by Hickam from his payroll account. Hickam paid all payroll taxes and made all necessary deductions. Hickam then billed Goya for all of these expenses. (GC-3:68-70; GC:12, 16, 20, 27).

There is no other evidence connecting Hickam to Goya.

K. Kent Burt

Burt owns 40 acres of Thompson's adjacent to Hickam's property. He farms and runs "Mom and Pop" gas stations. (3:131-132). Hickam has never picked or packed Burt's grapes. (4:89).

In 1977 only, Hickam provided Burt with tractors and equipment, his own steady employees to operate them, and a foreman and crew employees for necessary ranch operations, such as vine clipping, weed control, dusting, and suckering. Hickam describes this as a contract deal. (3:131-134). Burt apparently had no equipment of his own at that time (3:134). Hickam paid these employees from his payroll account and billed Burt for the expenditures. Hickam did charge a "rental" for the equipment. (GC-3:164-166; GC-10, 14, 18, 25).

There is no indication who made day-to-day decisions on

Hurt's ranch, and no other evidence to connect Hickam with it.

L. Bruce Myers

Myers' property is in Exeter, adjacent to Hickam's leased property. It consists of approximately 200 acres, including 30 acres of Emperors. (3:105-106).

In 1978, Hickam stripped Myers' Emperors into gondolas for juice. Hickam "contracted" to strip Myers' field. Hickam sent in Hector with a crew at a time convenient to Hickam. Hickam provided all the equipment necessary, including trucks and gondolas, and apparently took full responsibility for the harvest. (3:105-107).

Hickam paid the employees who did this from his payroll account, making all necessary deductions and paying all required payroll taxes. (GC-11, 15, 19, 26). He charged Myers a per ton rate for this service (GC-3:88).

M. Zucca Farms

Zucca was owned by Elwin Zucca, a farmer, until 1979, when he sold it. It consisted of 60 acres of Emperors and Calmerias. (3:113-114).

In 1978, Zucca contacted Hickam to pick and pack his grapes. Hickam and Zucca jointly decided when to pick. Hickam then sent in a crew under Gloria. Hickam provided all the equipment necessary to do the harvest. (3:114-115). Hickam packed the grapes and sent them on to cold storage, apparently in full control of the harvest to the cold storage process.

Hickam paid these employees and supervisors from his payroll account. He then billed Zucca for the expenditures. (GC-3:100-102; GC-11, 15, 19, 26).

C. Hickam's Picking and Packing Operation In General

The grape harvest usually comes in September and can last into December and lasts about two months. The grapes from all of the ranches tend to ripen at about the same time, with slight variations (2:123-125). If the quantity of grapes intended for the packing house is too great, then the harvest must be coordinated to keep from overwhelming the packing house (Id). This is done by Hickam, who, once the individual owners tell him their grapes are ripe, checks the ripeness himself (3:46-58), and takes responsibility for getting the crop in, pacing it, and delivering it to the shipper/seller. Hickam picks the exact time to pick, and controls the crews who do the picking. Crews under Hector or Gloria (and occasionally others) are directed as to where and when and how to pick by Hickam. The hours

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are reported to Hickam. Hickam then pays the employees from his payroll account on checks bearing only the name of Hickam and his wife (GC-4). The rate of pay is decided by Hickam for his own property. All other owners appear to follow Hickam's rates automatically, or set rates similar to Hickam's after consultation with Hickam and his supervisors (4:46-47, 110-111; 5:44-45). The only exception to this appears to be El Dorado, which appears to negotiate its rate with Hector, independently of Hickam. El Dorado usually pays slightly higher rates than Hickam (Watte'stestimony). The employees receive only one check; a Hickam check, no matter whose property or the number of properties they have worked on during that pay period. Hickam makes all the required deductions from the checks, files all the required forms, and pays all the required payroll taxes. Should Unemployment Insurance, S.D.I., or Workers' Compensation Insurance rates rise, it is Hickam's rates that receive the increase. Hickam maintains all necessary payroll records for these employees. Nobody else does.

Hickam provides all the equipment used for the picking process, including trucks, tractors, gondolas, pick-boxes, lug boxes, and hand tools. The grapes are packed at Hickam's packing house; Hickam provides all the equipment used there, including lug boxes, fork-lifts, trucks, and labor. The grapes are hauled from the field to the packing house, and from the packing house to an independently owned cold storage facility in Exeter (3:23). At this facility, Mendelsoh-Zeller, the shipper/seller takes control of the grapes (Id; 3:29). Hickam bills the owner for the labor and the equipment used in the harvest and charges a per box fee for the payroll accounting (3:1-2; GC-3).

All table grapes picked by Hickam's crews are packed at Hickam's packing house. Hickam packs the grapes under two labels owned by Mendelson-Zeller: Talk of the Town or Nob Hill (depending upon the grade). Mendelson-Zeller is an independently-owned sales and shipping operation (3:15). All grapes packed by Hickam are sold by Mendelson-Zeller (with the possible exception of Griggs). (3:40). The grapes are identified when being packed and stored and shipped and sold by lot numbers assigned by Mendelson-Zeller (3:21-22). Most of Hickam's profit arises from the packing operation (3:4).

Hickam claimed that Mendelson-Zeller makes independent contracts with each grower (3:21), but there was no evidence introduced to support this contention. Hickam's own contract with Mendelson-Zeller gives Mendelson-Zeller shipping and sales rights over all grapes owned or controlled by Hickam (GC-6; 3:38-39).

As grapes arrive and are processed through Hickam's packing house, Mendelson-Zeller gives Hickam weekly "advances" (actually payments for) against his expenses. Thus most of the bills and charges to the owners are paid to Hickam by Mendelson-Zeller. Mendelson-Zeller then charges the individual owner's accounts as the grapes are sold. The owner gets paid when the bill against his account, and the 10% charges by Mendelson-Zeller (3:12) are paid-off? the owner gets whatever else comes in. Mendelson-Zeller keeps the owners (and only the owner) advised of sales as they occur. (3:81-82; GC-9). Hickam bills the individual owner at the end of the harvest for his entire service, but expects to be paid only for what the Mendelson-Zeller advances have not covered (3:24-28, 30-31, 34-37). Mendelson-Zeller also handles cold

storage expenses in a like manner (3:84-85, 89-90).

Mendelson-Zeller takes control of the grapes at Exeter cold storage (3:23, 29). Hickam does continue to act in an advisory capacity, informing Mendelson-Zeller if any grapes were picked under conditions which would require early shipping.

Hickam has also received a "commission" from wineries for each ton of juice grapes delivered, from his own land, and from the land of others. Hickam is paid for the grapes and decides how to distribute these funds (4:36-38).

III. The Custom Harvest Doctrine

There is no National Labor Relations Act (hereinafter "NLRA") analogous to the ALRA Custom Harvester Doctrine. Thus, the Custom Harvester Doctrine is recently developed and still evolving. California Labor Code Section 1140.4(c) states:

> "The term 'agricultural employer', shall be liberally construed, to include any person acting directly or indirectly in the interest of an employer in relation to a agricultural employee, any individual grower, cooperative grower, harvesting association, land manufacturing group, any association of persons or cooperative, engaged in agriculture, and shall include any person who owns or leases or manages land used for agricultural purposes, but shall exclude any persons who supply agricultural workers to an employer, any farm labor contractor as defined by Section 1682, and any person functioning in the capacity of a labor contractor." (emphasis added)

The Custom Harvest doctrine is entirely derived from case interpretations of the above section, and Section 1682, which defines the meaning of the term "labor contractor." The term "custom harvester" has been defined as similar to a labor contractor, but as being "something more as well". Kotchevar Brothers, 2 ALRB No. 45 (1976). It is the nature of this "something more" that concerns us here.

The key inquiry in defining the "something more" that makes a custom harvester, is to ask who controls the terms and conditions of the worker's employment. Freshpict Foods, Inc. and Nicholas Land and Leasing Co., 4 ALRB No. 4 (1977). The object is to discover by looking to the entire relationship (my emphasis) between the employees and their alternative possible employers (Napa Valley Vineyards Co., 3 ALRB No. 33 (1977), and seeking to whom are the employees' primary ties as employees. Gourmet Harvesting & Packing, 4 ALRB No. 14 (1978); Joe Maggio, Inc., 5 ALRB No. 26 (1978). The entity with the strongest ties

as defined by its control over the workers and interest in them, is deemed the proper one to bear the burden of negotiating with the workers' chosen collective bargaining representative. Freshpict Foods, Inc., supra.

Several factors, none usually determinative alone, are to be considered and balanced in making the inquiry described above. These include:

1. The provision of equipment

Although this has sometimes been qualified to mean costly and specialized equipment (Kotchevar Bros., supra; The Garin Co., 5 ALRB No. 4 (1978)), the provision of more hand tools has been considered significant. Gourmet Harvesting & Packing, supra. Since the provision of, or failure to provide, any (my emphasis) equipment has a direct effect on employment conditions, there seems to be no rational basis for limiting this factor to costly or specialized equipment.

2. Independent control of the operation being done.

The custom harvester is analogous to an independent contractor. He is asked to do an agricultural task. He then takes responsibility for getting the job done and the manner of performance is up to him. As with an independent contractor, the employees in the operation are his, not the owners. This assumption of responsibility is usually described as independent managerial judgment. The more discretion over and responsibility for a significant operation an alleged custom harvester has, the more likely he is to be found to be a custom harvester. Jack Stowells, Jr., 3 ALRB No. 93 (1977); Gourmet Harvesting & Packing, supra; Sutti Farms, 6 ALRB No. 11 (1980); Napa Valley Vineyards, supra; Kotchevar Brothers, supra.

3. Control of the employees, i.e., final authority to hire, fire, discipline, supervise, etc., Jack Stowells, Jr., supra; Freshpict Foods, Inc., supra.

This entails more than mere control over the crew's internal operations. Sutti Farms, supra. An additional perspective to this approach can be useful here. The subjective view of the employee as to who he reasonably believes his boss to be is significant.

4. Who does payroll for the workers, i.e., sets rates, hours, pay, makes necessary deductions and pays required payroll taxes, keeps the payroll records, and determines benefits. Freshpict Foods, Inc., supra; Gourmet Harvesting & Packing, supra.

5. How the alleged custom harvester is paid is significant. Napa Valley Vineyards, aupra; Sutti Farms, supra.

The more that payments made appear to be for an agricultural service rather than for the mere provision of labor, the more likely is a determination that the entity is a custom harvester. Id; Gourmet Harvesting & Packing, supra; Freshpict Foods, Inc., supra.

6. The interest of the alleged custom harvester in the work being done and in the workers.

If the alleged custom harvester has a direct or indirect economic benefit as a result of his services, a finding of custom harvesting is more likely. Napa Valley Vineyards, supra. The reasoning and guidance of regulations propounded under the Fair Labor Standards Act, 29 CFR § 780.331, concerning whether crew leaders or labor contractors are the employers of the workers they supply, is apposite. That section states:

> (b) The situation is different where the farmer only establishes the general manner for the work to be done. Where this is the case, the labor contractor is the employer of the workers if he makes the day to day decisions regarding the work, and has the opportunity for profit or loss through" Els supervision of the crew and its output.... Sis opportunity for profit or loss comes from the manner of performance of work by his crew and his authority to determine the wage rates paid to his workers!(Emphasis added).

This test helps to distinguish the nebulous ground between a custom harvester and labor contractor by emphasizing for the opportunity to benefit beyond a simple surcharge for the provision of labor.

There is an additional policy reason to find that the one who pays the employees should be considered to be their agricultural employer.

If a union rancher could limit the size of his bargaining unit by claiming that many employees that he pays and whose work he benefits from are actually someone else's employees, and that he (the union rancher) merely does a "payroll service," there is a tremendous potential for abuse. A wily union rancher could set up several "puppet" ranchers for whom he did a "payroll service." These puppets would, on the surface, control their employees; in reality, they would follow the union rancher's orders (in return for a cut of the profit) in controlling these employees. Thus, the union rancher would be the one actually in control, but this would be very difficult to prove. The effective size of the union rancher's operation would be greatly increased, but the size of his bargaining unit would not have increased with it; he would have to deal with the union only on the part that he openly farmed himself. This is essentially what Hickam is doing.

Thus, whenever one who does a payroll service benefits in any way (beyond an appropriate fee for the provision of that service) then

the payroll handler should be carefully scrutinized for possible liability as the true employer of the employees he pays. Where the additional benefits of the work to the payroll handler are more than just incidental, the handler should be found to be the actual employer of the employees.

These are the tests we shall use in examining the facts surrounding Robert H. Hickam's operations to determine whether or not he is a custom harvester.

IV. Conclusions of Law with Respect to the Custom Harvester Issue.

1. Land Hickam Owns or Solely Controls

Respondent admits, and I find, that he is the agricultural employer of all employees paid by Hickam who are working on the land owned or solely controlled by Hickam. These include the Kameo, Rowley, Young, and Nelson Ranches, Griggs Ranch from February 1978 to March 1979, and The Vineyard (which he leased).

2. Land in Which Hickam has an Owner's Interest Short of Outright Ownership

A. H&M

Hickam owned H&M in partnership with Andrew Marincovich from April 1978 to June 1970. Examining the pertinent custom harvesters factors we find that:

1. Hickam provides all equipment at H&M, including tractors and tractor implements. He also provided his credit at local businesses and used by H&M employees for H&M purposes. Hickam paid these bills as they came due and then billed H&M for these expenditures.

2. Hickam "advised" with respect to pruning, pest control, fertilization, timing of work, weed aisling, and other "major operations", and with respect to specific problems as they arose. These are the kind of routine decisions with respect to ranch operations that a ranch manager normally would be paid to make himself. Miller apparently always followed Hickam's "advice". Hickam's ranch "manager" was paid only $600.00 per month. The normal fee for ranch managers is $5.00 to $7.00 per acre per month. For the 240 acres of H&M this would be $1,200.00 to $1,680.00 per month, two or three times greater than Miller, the alleged "manager", is actually paid. Hickam's partner, Andrew Marincovich is an accountant in Long Beach and is in the area only inter-

mittently. Hickam lives nearby, is a farmer, and has been for more than twenty (20) years. Thus, Claude Miller seems to have been a supervisor with a degree of independence, rather than a manager with decision-making authority.

In any case, it seems likely that Miller would tend to defer to the advise of a 50% owner who is also a farmer.

3. Hickam often supplied his own steady employees to operate the equipment he provided at H&M. The pruning crew that usually worked for Hickam pruned H&M's trees. Those of Hickam's individual employees who were his irrigation system repair experts also repaired the H&M irrigation systems. Hickam has borrowed H&M employees, including Claude Miller, to do work on Hickam's land. Claude Miller has even supervised work at Hickam's Young Ranch.

Claude Miller lacks full responsibility as a ranch manager; he also lacks final authority to hire, fire, discipline, and supervise employees; the owner retained this power. Hickam, the local owner, had this authority. Since Claude Miller was a manager, supervised by Hickam, any employee he hired (for example, the H&M steadies) is derivatively Hickam's employee and, therefore, Hickam has the final authority on hiring.

4. Hickam did the payroll for all H&M employees, except harvest employees. The Harvest of H&M was conducted entirely by custom harvesters, i.e.,Tenneco West or Woodlake Packing, with their own employees and equipment. For all other employees in all other operations, Hickam paid

the employees on Hickam's payroll checks from his payroll account. The employees received only one check regardless where they worked or how many properties they worked at. Hickam made all the necessary payroll deductions and paid all the required payroll taxes. Hickam kept all the payroll records. He did all this, even though his partner Marincovich, was a CPA for more than thirty years, and had a Long Beach accounting firm and was presumably better equipped to do so.

5. Hickam billed H&M once a month in a single combined bill for general payroll, services payroll (for example, pruning plums), equipment rental, and operator payroll, and items charged to Hickam's account at local businesses for H&M. The bills appear to be for agricultural services at least insofar as the payroll equipment operator payroll and credit bills are concerned.[5]

6. Hickam, a 50% owner of H&M, certainly had a direct interest in the operations his employees performed there. The value of Hickam's interest was directly related to H&M's well-being. Also, the timing and the performance of the operation at H&M were of direct interest to Hickam. Hickam could certainly affect the timing and substance of operations there via his "advice" and the provision of employees, equipment, and services. That he did so is evident. Marincovich, the other partner, was not in a position to similarly affect his own interests in H&M, although, as a 50% owner, he did share final authority with Hickam.

From the foregoing, it seems evident that Hickam had final

[5]It is usually clear from the billing that specific services were being performed by the men and equipment. Thus, the bill is more in the nature of a billing for services than simply a bill for the provision of labor.

day-to-day authority of operations at H&M, although he usually allowed Claude Miller to supervise operations and Hickam "advised" with regard to all important operations. Hickam had the authority to overrule Miller at any time.

Hickam provided essential sophisticated equipment and operators. He arranged for specific services for H&M. He received the benefits of the services done as part-owner of H&M and in terms of profit on the equipment rented to H&M, and in the provision of work and employees of value to Hickam who, had Hickam been unable to provide sufficient work, might well have moved on.

Because of the foregoing factors, I find Hickam to be the true operator of H&M and thus the agricultural employer of the employees there.

B. HMZ.

The H&M land was sold in June of 1979 to Lawrence Zuanic Hickam, Marincovich, and Zuanich formed the HMZ partnership, which leased the former H&M land back to Zuanich and bought 160 acres more, upon which grapes were planted in late 1979 and early 1980. The partners were all equal one-third owners of HMZ. Examination of the factors, in light of the six factors from above reveal that:

1. Hickam provides much of the equipment at HMZ, including tractors, tractor implements, and fuel, and often operators for the equipment. He charges a fee for the use of this equipment. Hickam has made his credit with local businesses available for use by HMZ employees for HMZ business. Hickam paid these charges as they came in and then billed HMZ for them. Hickam also provided the cuttings planted on the HMZ acreage. HMZ paid for these cuttings. Hickam provided the hand tools that were used to plant these cuttings free of c ge

2. Claude Miller, the former H&M "manager," was retained to "manage" HMZ. His maximum salary was $800 per month (as of June 1980). At the normal $5-7 per acre per month, the manager's fee, as manager of HMZ's 400 acres, should be $2,000.00 to $2,800.00 per month, three or four times what Miller was paid. Samuel Davila, a son-in-law of Zuanich, has lived on the land since 1979 and received a salary of $650 per month. There is no evidence that Davila has independent authority of any kind.

Hickam testified that he "advises" Claude Miller with respect to pest control, fertilizing, time of operations, cultivation at HMZ, and Miller apparently always followed that advice. Miller's true status as a supervisor, with a high degree of independence, is reflected by Hickam's statement: "I turn him loose on their own initiative and I kind of oversee and if it is not done right to suit me or the way I think the partners want it done, I say "something." Hickam's true status is also thereby illuminated. It seems likely that Miller would defer to Hickam's "advice" since Hickam is a long-time farmer in the area and part-owner of HMZ. The other two HMZ's partners, Marincovich and Zuanich, are respectively a Long Beach CPA and a Fort Lauderdale, Fla., fisherman. Each is in the area only intermittently. Although they do as owners share final authority over the ranch with Hickam, Hickam appears to have effective day-to-day control of HMZ.

Hickam apparently directed and oversaw the planting of the HMZ "160." This work was done by crews working under Hickam's regular harvest time supervisors, Hector Rodriguez and Gloria Verdin. The HMZ "160" is maintained by employees on Hickam's payroll, including his own steady employees. Hickam testified that he often visits the

"160" to check on operations and that he regularly reviews the work at all of HMZ.

3. There is no evidence that authority over employees at the 240 acres that were formerly H&M changed when it became HMZ. The planting work on the "160" was done by crews hired by and working under Hickam's regular harvest time supervisors, Hector Rodrigues and Gloria Verdin. The cultivation and maintenance of the "160" is done by employees on Hickam's payroll, including Hickam's steady and individual employees.

Since Claude Miller lacks full authority as a ranch manager, he also lacks final authority to hire, fire, discipline, and supervise employees. The owner clearly retains this power. Hickam as the sole local owner certainly has such authority, since Miller "manages" only under Hickam's supervision. Any employee he hires to do HMZ's operation? are derivatively employees of Hickam, since Hickam has final day-to-day authority over hiring and firing.

4. The payroll of HMZ employees was done by Hickam until the Fall of 1980 when this hea ing became imminent.

At that time Marincovich arranged to take over HMZ's payroll. Marincovich has been a CPA for approximately 30 years and runs a Long Beach accounting firm which is presumably better equipped to do payroll accounts than Hickam. Hickam alleges that they were not equipped to do it untilrecently is unconvincing. The employees are paid on Hickam payroll checks. Hickam makes all necessary deductions and pays all required payroll taxes, disability, workmen's compensation and unemployment insurance. If something should happen to cause these claims to increase, it is Hickam who feels that increase. For example, if numerous

accidents at HMZ cause the disability premiums to raise, it is Hickam's payroll that is affected, not HMZ. Hickam bills HMZ for these payroll expenditures.

5. Hickam bills HMZ once a month in a single combined billing for general payroll, specific services (for example, weed hoeing the "160") equipment rental, operator payroll, and items charged to Hickam's account at local businesses for HMZ. These bills appear to be more in the nature of a bill for services than a billing for the mere provision of workers.

6. Hickam certainly had an interest in the work done at HMZ, and especially with respect to the operations done on the grapes there. Hickam will pack HMZ's grapes (when the vines begin to produce) for so long as he is a partner of HMZ. The care of the young vines contributes directly to their health and thus their productivity as matured vines. Hickam is paid for his packing services on the basis of volume packed out; the more grapes producing the more grapes that are packed out and the more money Hickam makes. Thus, by his careful supervision of HMZ grapes, Hickam will financially benefit. In addition, the value of the HMZ land (of which Hickam owns one-third) is increased by Hickam's care in overseeing operations there and by his provision of whatever HMZ needs that Hickam can provide. The other owners, Marincovich and Zuanich, were not in a position to similarly protect or advance their interests via their influence over operations on HMZ.

Moreover, Hickam's ability to rent equipment and "lend" employees to HMZ helped allow Hickam to keep valuable employees who might otherwise have moved on due to lack of sufficient work. It also allowed Hickam to keep equipment that he would not have otherwise been able

to afford.

From the foregoing, I conclude that Hickam must be held to be the agricultural employer of employees at HMZ. He had final day-to-day authority, although he usually delegated this to Claude Miller. He provided essential sophisticated equipment, operators for that equipment, materials, crews, and supervisors, and arranged for special services to be done for HMZ. The employees looked to Hickam for their paychecks. Hickam benefitted from his influence over HMZ both in terms of the increased value of his ownership interest, in terms of anticipated profit, and in terms of the acquisition of employees and equipment he would not otherwise have afforded.

3. Land in Which Hickam has no Ownership Interest.

A. El Dorado

El Dorado consists of approximately 400 to 450 acres, of which there are approximately 400 acres of grapes (Emperors, Thompsons, Almerias, Calmerias, Carrigans), and a few acres of plums. The property is located between Exeter and Lindsay. There are five owners, including Marincovich and Zuanich.

1. Hickam has provided all tools and equipment necessary for the grape harvest since 1970. He has provided equipment operators at other times for El Dorado's own equipment, and has done repair and maintenance work on El Dorado's equipment.

2. Hickam managed El Dorado from 1970-1976 and trained his successor Mark Watte,from December 1974 to mid 1976. Since 1976,Hickam has continued to advise Mark and Bryan Watte, particularly in respect as to when to harvest. Hickam's advice is critical here because of the necessity for having his packing house available to receive the grapes. The decision of when to pack is made jointly between Hickam and the Wattes.

During the harvest, Hickam and his supervisors oversee and direct the work. They direct where, when and how the picking is to be done. Hickam's supervisors coordinate the picking with the packing house and with the trucks hauling the picked groups to the packing house. Hickam then grades and packs the grapes and hauls them to cold storage.

Hickam's employees have also testified to doing suckering and deleafing work at El Dorado at Hickam's direction and under Hickam's supervisors. These crews were paid by Hickam. Crews

paid by Hickam have also planted grapes at El Dorado. Moreover, in 1975, when the Respondent's election in the instant case took place, employees working at El Dorado voted without company objections by Hickam, although Hickam did object on other grounds to certain votes. Hickam has never asked that the bargaining unit be clarified.

3. Hickam has authority over all harvest employees. Hickam is obviously as concerned as the owners as to the quality of the actual picking since he has a direct interest in the final result. Grapes that are improperly picked are either hard to pack, are ruined for packing. Hickam is paid for his packing by the number of boxes which he packs out. The better the grapes are picked, the more that can be packed. Hickam's harvest supervisors instruct the harvest employees at the start of each day how Hickam wants the picking to be done. Should the field crews improperly pick the grapes the packing house supervisor will inform Hickam and Hickam cracks down on the pickers. Hickam's supervisors have fired employees who failed to pick correctly.

Hickam directs Hector and/or Gloria where and when to work the crews. Hector testified that although he remembers working at El Dorado, and several other places, he was uncertain of who the owner was, and the only thing he was sure of is that he was working for Hickam.

4. Hickam paid all El Dorado employees when he was manager. Since 1976, Marincovich has done most of El Dorado's payroll. Hickam has continued to pay all harvest employees. He has also paid employees for special operations at El Dorado, e.g., planting grapes, pruning plums, pruning grapes, suckering, deleafing, and operating equipment. These employees include Hickam's steady employees, individu

employees, and crew employees.

Although the Wattes apparently set the rates, Hickam paid these employees on Hickam payroll checks drawn on Hickam's payroll. Hickam makes all necessary deductions and pays all required payroll taxes. Hickam keeps the payroll records. Should, for example, disability insurance premiums go up because of accidents to these employees at El Dorado, Hickam's premiums would be the one affected. Hickam does this even though Marincovich, at El Dorado owner, is a CPA and heads a Long Beach auditing firm that could do the work. Hickam's explanation that Marincovich isn't equipped to do it is not credible.

5. Hickam bills El Dorado once a month on a combined bill for harvest payroll, other services payroll, equipment and operator payroll, and packing and hauling charges. The bills appear to be more in the nature of bills for services than for the operation of labor.

6. Hickam has an economic interest in El Dorado's grape operation. Hickam testified that he made a good profit from his packing operation. Most of Hickam's packing profits come from El Dorado's business. Hickam testified that although it would be possible, it would be difficult to justify running the packing house without El Dorado.

Hickam is paid for packing by the number of packs out. The better the grapes, and the better the quality of the packing, the more grapes will be packed out. Hickam seeks to maximize this through specific services provided HMZ, and through his supervision and control of the harvest operation. Hickam packs everything he picks. His profits from the packing plant far exceed the profits from the picking. He picks because he gets to pack. These two operations are linked in Hickam's operation. If Hickam wasn't given the packing (where his

profit comes from), it is doubtful that he would do the picking. He does the picking with an eye towards maximizing his packing profits.

Hickam also testified that he couldn't afford to keep a crew for the whole season by himself. Hickam needs a crew available at all times during the harvest in order to keep the overall picking/packing operation smoothly conducted. The El Dorado harvest helps Hickam to keep a crew available for the entire harvest season; without El Dorado he couldn't produce enough work to hold a crew. The El Dorado harvest also allows Hickam to acquire equipment he couldn't otherwise afford.

In view of the above analysis, I find that Hickam is the agricultural employer of the El Dorado grape harvest employees. Hickam controls the harvest because it is in his economic interests to do so. He directs, supervises, and has final authority over the workers involved. Those employees look to Hickam for their pay. They get only one check regardless of where they have worked.

Hickam is also the agricultural employer of those specific operations done by the employees on his payroll at El Dorado. These are in the nature of contract work. Hickam's steady employees are sometimes involved. Hickam was asked to do a job; how he did it was up to him. The El Dorado owners were secure in the knowledge that Hickam would do the best job he could in order to maximize his packing profits.

B. Dean Wyrick

Wyrick is one of Hickam's steady employees. He owns 35 acres of Thompsons, Emperors, Calmerias, adjacent to Hickam. Hickam has packed Wyrick's grapes since approximately 1970.

1. Hickam provides Wyrick with all necessary harvest equipment and had provided Wyrick with much equipment for other operations. This includes tractors, tractor implements, trucks, and hand tools. Hickam charges Wyrick a fee for the use of this equipment.

2. Wyrick apparently controls most operations on his land. However, he decides when to pick only after conferring with Hickam, in order to coordinate the packing house. Once this is decided, Hickam sends a crew under one of Hickam's supervisors to do the picking. Hickam controls Wyrick's picking operation for the same reason that he controls El Dorado's picking operation. Hickam usually allows Wyrick to oversee the picking on his own property, but the picking is done as per Hickam's instructions, and is evaluated by the packing house output. Hickam has the ultimate supervision of the harvest, does the packing and hauling, first to the packing house and then to cold storage.

Hickam also provides his own steady and/or individual employees to do specific operations at Wyrick's. This work is in Hickam's own interest as well as Wyrick's because the health of the vineyard is directly related to its productivity; the more grapes produced means more boxes packed and more money for Hickam. The rates paid are the same as Hickam's rates, and Hickam pays the employees.

3. Wyrick apparently has final authority to hire, fire, etc., on his own property. It is unclear who has final authority over the harvest employees. Hector testified that although he remembered working at Wyricks, the only thing he knew for sure was that he was working for Hickam. Since Hector is one of Hickam's regular harvest supervisors, and since Hickam sends the crews there, it seems probable

that Hickam controls the hiring, firing, and discipline of harvest employees.

4. Hickam pays all of the employees at Wyricks. The rates paid are the same that are paid by Hickam. It is uncertain who sets the rates at Wyricks. It appears that Hickam sets his rates and Wyrick simply acquiesces. The employees receive just one check, even though they may also report to Hickam's property and other properties as well in that pay period. The checks are Hickam's payroll checks drawn on Hickam's payroll account. Hickam pays all the payroll taxes and makes the necessary deductions. If disability insurance premiums on employees at Wyricks rise, it is Hickam's policy that is affected.

5. Hickam bills Wyrick with a single monthly bill for any services done. The bill includes payroll expenditures, picking, packing, hauling charges, and equipment rentals. The bill (GC-3; p. 35, 47-49, 108-110, 162, 163), especially with respect to harvest operations looks like a bill for multiple services and not merely for the provision of labor. Picking, packing, and hauling is done for a rate per box plus labor. The bill also includes labor by Hickam's steadies, and payroll for specific services. These services are often performed in conjunction with the same work being done on Hickam's own land. The employees simply continue their work onto Wyrick's adjacent property. The continuation onto Wyrick's land seems to be done at Wyrick's behest but with Hickam's consent to the use of his employees and equipment. Thus, the billing to Wyrick for labor and services is for service and its incidental labor.

6. Financially Hickam makes little profits from picking. He picks because he gets to pack what he picks, and the quality of the

picking, in part determines the packing house profit. Thus, Hickam has an interest in the execution of the picking operation at Wyrick's, an opportunity to profit from the manner of the execution of the harvest. Hickam supervises the harvest operation in order to maximize his profits on the packing. Wyrick agrees to Hickam's control of the harvest. Hickam also effectively controls the rates the employees are paid since Wyrick apparently acquiesces to Hickam's rates.

From the above I conclude that Hickanis the agricultural employer of the harvest employee's on Wyrick's property. Hickam must similarly be considered the agricultural employer of those employees who work on Wyrick's land with Hickam's consent while continuing work being done on Hickam's land.

C. Poxin.

Poxin consists of approximately 50 acres of table and juice grapes. It is managed by Louis Weisenberger, who also lives there.

1. Hickam provided equipment necessary to do the Malaga harvest he contracted to do in 1977 and 1978. This was a juice harvest; therefore, packing was not involved.

2. Hickam had complete control of the harvest operation.

3. Hickam controlled the harvest employees at Poxin. He testified to doing this under contract.

4. Hickam did all the payroll for the harvest at Poxin. He never billed Poxin; he was paid a fee for the operation, pursuant to the contract.

5. Hickam was paid a rate per ton picked for the harvest.

6. Hickam controlled the operation and the rates paid.

He clearly had an opportunity to profit through the manipulation of this power. Hickam sold the grapes harvested under his own contract with a winery.

From the above, I find it inescapable that Hickam was the agricultural employer of the harvest employees at Poxin.

D. Mt. View.

Mt. View is near Exeter. It produces table grapes and nectarines on 50-1/2 acres. It has been owned since 1978 by the Grewal Brothers, who did not live in the area. The property has since then been sold.

During 1978, Hickam was the manager of Mt. View (see Statement of Facts). As such, Hickam was the agricultural employer of all employees at Mt. View in 1978. Hickam also picked and packed Mt. View grapes in

1977 and 1979.

1. Hickam provided all necessary tools and equipment for the harvest operations at Mt. View. Hickam continuously provided equipment and employees to do pruning and deleafing at Mt. View.

2. In the 1977 and 1979 harvest, the decision as to when to pick was made by Hickam. Hickam then sent in his crews under his supervisors with his equipment to do the harvest. Hickam picked the grapes, hauled them to his packing house, packed them, and hauled them to cold storage. Hickam has also done other operations for Mt. View in 1977 and 1979,pruning and deleafing. Hickam paid all of these employees. The fact that Hickam paid only for these particular jobs indicates that Hickam did not provide a payroll for Mt. View.

3. Hickam apparently controlled the hiring, firing, disciplining, etc., of the employees on his payroll working at Mt. View. These employees worked under Hickam's supervisors, and Hickam directly profited from the manner in which they did their work. Thus, Hickam had an interest in seeing that they did it well. The employees at Mt. View reported their time directly to Hickam, not to the Grewals. Hector testified that, although he remembered working at Mt. View, he did not know who owned it and that the only thing he was sure of there was that he was working for Hickam.

4. Each of these workers who worked at Mt. View were paid by Hickam with Hickam's payroll checks from the Hickam's payroll account. Hickam made all necessary deductions and paid all required payroll taxes. If a disability insurance policy had to be adjusted on these employees accounts, it was Hickam who was affected. Hickam apparently determined the pay rates.

5. Hickam billed Mt. View for these expenses in a single monthly bill for picking, packing, hauling, equipment rental, and other service charges. He received a per box fee for the packing and hauling, plus labor for the picking. Hickam was reimbursed for labor expenses for the other services.

Hickam's interest in the harvest is the resulting packing business.

As a result of the above analysis, I find that all employees who worked at Mt. View on Hickam's payroll were Hickam's agricultural employees. Hickam provided their equipment, directed their work, was responsible for it, and had an economic interest in its performance. The employees were paid by Hickam, and looked to Hickam as their employer. Hickam received fees for this which seems to reflect a service fee rather than a pure labor fee.

E. Rainey.

Rainey's ranch is between Exeter and Lindsay. He grows Calmerias on approximately 12 acres. He is retired, lives in Visalia, and his son lives on the ranch. Hickam has harvested and packed Rainey's grapes since approximately 1976.

1. Hickam provides all of the equipment necessary to do the harvest operations at Rainey's.

2. The decision as to when to harvest is made jointly by Hickam and Rainey. Hickam apparently has the final say in order to coordinate the harvest with the packing house operation. Hickam then directs the crews, under his own supervisors, to start, and Hickam takes responsibility for the harvesting, packing, and hauling to cold storage of Rainey's grapes. Hector remembers working at Rainey's property, but

says the only thing he was sure of there was that he was working for Hickam.

3. Hickam apparently had final authority over the hiring, firing, and discipline of the harvest employees at Rainey's.

4. All harvest employees at Rainey's are paid by Hickam from Hickam's payroll account on Hickam's payroll checks. The times are reported directly to Hickam by Hickam's supervisors. Hickam pays all payroll taxes and makes all necessary deductions. Hickam's disability insurance policy and workers compensation policy is on the line should anything happen.

5. Hickam sends Rainey a single bill for picking, packing, and hauling. The charge is based on a per box rate plus labor. This is more like a fee for a service than a fee for labor.

6. Hickam stands to benefit economically from his control of the picking since he can, through supervision of the picking, maximize packing profits.

I find, based on the analysis above, that Hickam is the agricultural employer of all employees on his payroll determined to be involved in the harvest of Rainey's grapes.

F. Morton/Horton.

Morton owns 20 acres (including 8 Thompson and 4 Emperors) adjacent to Hickam's property. Horton owned it until 1979 when he sold it to Horton. Horton was a farmer; Morton is in the construction business,

1. Hickam provided all the equipment for the harvest operations he did there in 1977 and 1979. Although employees paid by Hickam have done other operations at Morton's, there is no evidence as to who supplied the tools needed.

2. Hickam has twice picked and packed Horton/Morton grapes: in 1977 and 1979. The decision when to pick appears to have been made jointly by Morton/Horton and Hickam. Hickam apparently had the final say in order to coordinate the harvest with the packing house operation.

Hickam has paid employees to tie vines, thin trees, and prune trees. There is no evidence as to who decided these operations were necessary or who supervised and controlled them. Since these are not all of the operations necessary to maintain a vineyard or orchard, it seems possible that Hickam was asked to perform these particular operations for which he did the payroll. These seem even more likely in light of the fact that Morton (who owned the ranch when these operations were done) is not a farmer.

It is also possible that the crew under Hector, and paid by Hickam, planted grapes for Morton, but the evidence is unclear.

3. The harvest crews of 1977 and 1979 were under Hickam's control. They were hired by Hickam's supervisors and Hickam had final authority over discipline, and over the job. Although it seems likely that Hickam also had final authority over the employees in the other operations, there is insufficient support for this to permit such a finding of fact.

4. Hickam paid the employees who did the 1977 and 1979 harvest at Morton. He also paid the employees who did the other operations referred to above. They were paid with Hickam's payroll checks from Hickam's payroll account. Hickam made all the necessary deductions and paid all the required payroll taxes. Should there have been any reason to increase disability or unemployment premiums, Hickam' policy would have been the one affected.

5. Morton/Horton was billed for these operations in a single monthly bill which combined a per box charge for packing and hauling plus a labor charge for picking. The other operations were likewise billed in a single monthly charge when they occurred. Such billing is more like a bill for service than a mere bill for labor provided.

6. Hickam's interest in the harvest operation is related to the packing operation. The better the picking, the more boxes Hickam could pack out, and the greater the packing profit. Hickam maximized the packing output potential via his supervision of the harvest operation.

Hickam's interest in the other operations done on Morton's grapes are also related to the maximization of Morton's grape production. Hickam's interest in the other operations done on Morton's trees appears only to have been as a contractor.

Based on the above, I find that only the harvest employees at Morton/Horton were agricultural employees of Hickam. Hickam's links to the other operations and the employees concerned are too tenuous to find Hickam to be their agricultural employer.

G. M&B.

M&B is a partnership in which Morton is a partner; the other partner was never identified. The evidence indicates that all of M&B is planted with new grapes (planted in 1980) which have not yet produced a harvest. M&B was planted by crews under Hector and paid by Hickam. A crew under Hector, paid by Hickam, has also apparently done deleafing at M&B.

1. It is unclear who provided the equipment used for these operations at M&B.

2. Morton apparently decided these operations were necessary and arranged for them to be done, and arranged for Hickam to pay the employees.

3. Morton apparently held ultimate authority to hire, fire, discipline, and supervise the employees on these jobs.

4. Hickam did the payroll for these employees. They were paid with Hickam's payroll checks from Hickam's payroll account. Hickam kept all the records, paid all the payroll taxes and made all the necessary deductions. Hickam's social insurance policies were the ones on the line.

5. Hickam billed M&B for the payroll expenditures in a single monthly bill for the period when the operation was done. This bill appears to be more in the nature of a bill for a payroll service since Hickam apparently lacked any other involvement with M&B.

6. Hickam had no apparent interest in the operations at M&B, or any opportunity to benefit from them or control them.

Hickam is not the agricultural employer of the employees at M&B.

H. Victor Glaze.

Glaze owns 30 acres of Emperors next to Hickam in Exeter. Glaze is a farmer. He pulled his grapes in 1979. Employees paid by Hickam cut the wire at Glaze's (an operation necessary to pulling grapes), and Hickam picked and packed Glaze's grapes in 1979.

1. Hickam provided all the equipment necessary for the harvest at Glaze. Hickam apparently provided the tools necessary for the wire cutting, since Hickam sent the employees there to do that specific job.

2. Hickam apparently had full responsibility for and control over the execution of the 1979 harvest at Glaze's. Glaze asked Hickam if he could do it, an Hickam did. Hickam's only responsibility with respect to the wire cutters was to provide them when Glaze asked if Hickam had anyone who could do it.

3. Hickam had complete authority over the harvest employees at Glaze's. Hickam apparently also had authority over the wire cutters, since they were merely loaned to Glaze.

4. Hickam set the rates for the employees on his payroll who worked at Glaze's. They were paid on Hickam's payroll checks from Hickam's payroll account. Hickam made all the necessary deductions and paid all the required payroll taxes. If social insurance premiums were increased, Hickam's policy was the one to be affected.

5. Hickam billed Glaze for picking, packing, and hauling in a single bill that included a per box rate plus labor. This bill is in the nature of a bill for services. Hickam billed Glaze for the payroll expenditures for the wire cutters.

6. Hickam had an opportunity to benefit from the control of the picking at Glaze (see prior No. 6's above). Hickam had no opportunity to profit from the wire cutting.

Thus, Hickam is the agricultural employer of the harvest employees at Glaze and of the wire cutters that worked there.

I. Griggs Ranch (Luann Gilbert/James Griggs).

Griggs owns approximately ten acres of Emperors near Hickam's property. Griggs' daughter, Luann Gilbert, apparently handles business for Griggs since billings are often made to her. Hickam has picked, packed, and hauled Griggs' grapes since 1977.

1. Hickam provided the equipment used to harvest Griggs' grapes.

2. There is little evidence as to who decided when to harvest at Griggs. Hickam probably decided the exact time in order to coordinate the picking crews and the packing house operation. Hickam assumed full responsibility for the picking, packing, and hauling operation, and determined how the work was to be done. Hickam oversaw the execution of the harvest. Hector remembers having worked at Griggs, but felt that he was working for Hickam when he was there.

3. Hickam had the ultimate authority to hire, fire, and discipline the employees involved in the harvest operation referred to above.

4. Hickam effectively set the rates and paid the employees They were paid on Hickam payroll checks from Hickam's payroll account. Hickam kept the payroll records on his employees. If his social insurance policy is affected because of these employees, Hickam's policy was the one affected.

5. Hickam billed Griggs with a single bill for picking, packing, and hauling that was based on a per box fee for packing and hauling plus labor for picking. This was more in the nature of a fee for a service than for provision of labor.

6. Hickam had the opportunity to maximize his packing profits through his control over picking operations. Hickam made little from picking; Hickam made "a good profit" from packing.

From the above, I find that Hickam is the agricultural employer of the harvest employees at Griggs that are on Hickam's payroll.

J. Goya.

Goya consists of approximately 20 acres of Emperors. They were pulled in 1980. Hickam harvested and packed Goya's grapes in 1979.

1. Hickam provided all the necessary equipment for the harvest operation at Goya.

2. The Goya manager asked Hickam if he could do the harvest and Hickam apparently took full responsibility for the harvest. Hickam and the Goya manager probably jointly decided exactly when to pick, with Hickam having the final say in order to coordinate the picking crews and the packing house operation. Hickam then ran the harvest as he saw fit.

3. Hickam apparently had ultimate authority over the hiring, firing, and discipline of the employees. The crew was supervised by Hickam's regular harvest time supervisor, Gloria Verdin, and the crews had to satisfy Gloria and Hickam.

4. Hickam paid all of these employees and kept the payroll records on them. He paid all the required payroll taxes and made all necessary deductions. Hickam's social insurance policies were the ones on the line for these employees.

5. Hickam billed Goya with a single monthly bill for picking, packing, and hauling. The charge reflected a per box charge for packing and hauling, plus a labor charge for picking, and an equipment charge. This constitutes a bill for a service.

6. Hickam was due to maximize his packing profits via his control of the picking. Improperly picked grapes are not packable. Hickam makes little from picking; his real money is in the packing.

Because of the above facts, I find that Hickam is the agricultural employer of the 1979 Goya harvest employees.

K. Kent Burt.

Burt owns 40 acres of Thompsons adjacent to Hickam. Burt runs "Mom and Pop" Gas Stations. Hickam has neither picked nor packed Burt's grapes. Employees paid by Hickam have done other essential operations at Burts: vine clipping, weed control, dusting, and suckering, all in 1977. Hickam described these as contract deals.

1. Hickam provided the equipment necessary for these operations and the employees, including his own steadies. Burt had no equipment of his own at this time.

2. There is no evidence as to who decided these operations were necessary. Once the decision to do them was made, Hickam was hired to do them. Hickam took full responsibility for the job and did it as he saw fit. Hickam performed these operations on a contract to do them.

3. Hickam had final authorit over the employees involved in these operations. The employees worked for Hickam and had to satisfy Hickam.

4. Hickam paid these employees on Hickam payroll checks from Hickam's payroll account. Hickam made all necessary deductions and paid all required payroll taxes. Hickam kept the payroll records for these employees. If there was any effect on his social insurance policy, it was Hickam's policy that was affected.

5. Hickam billed Burt for these operations as they occurred. The bills indicate a per acre fee for the operation plus labor and equipment charges. These are clearly charges for the service,

not for the mere provision of labor.

6. Through his control of the operation and the employees' pay, Hickam had an opportunity to profit. The faster he could do the work, and the less he could pay his employees, or the fewer employees he could get by with, the greater was his profit.

Based on the above, Hickam must be found to be the agricultural employer of the employees involved in the above operations at Burt's. Ranch.

L. Bruce Myers.

Myers owns approximately 200 acres adjacent to Hickam's leased property, including 30 acres of Emperors. Hickam contracted to strip Myers' Emperors in 1978. This was a gondola harvest for juice and no packing was involved.

1. Hickam provided all the necessary equipment for this job.

2. It is uncertain who decided when the job was to be done or that the grapes should be stripped for juice rather than packed. It seems likely that the Myers' manager did so. Hickam took full responsibility for doing the stripping and did the job as he saw fit.

3. Hickam fully controlled the employees involved. They worked for Hickam, not for Myers, and it was Hickam whom they had to satisfy. The job location for this work for Hickam was simply at the Myers' ranch.

4. Hickam paid these employees on Hickam payroll checks from Hickam's payroll account. Hickam made all necessary deductions and paid all required payroll taxes. Hickam kept the payroll records for these employees. If there was any effect on his social insurance policy, it was Hickam's policy that was affected.

5. Hickam billed Myers for this operation in a single bill. He charged a per ton rate. This is clearly a bill for a service provided, not for the mere provision of labor.

6. Through his control of the operation and the employees' pay, Hickam had an opportunity to profit or loss. The faster Hickam could do the work, and the less he could pay his employees, or the fewer employees he could get by with, the greater his profit.

Based on the above, Hickam is the agricultural employer of these employees at Myers.

M. Zucca Farms.

Zucca was owned by Elvin Zucca until 1979. Zucca consisted of approximately 60 acres of Emperors and Calmarias. Elvin Zucca is a farmer. Hickam picked, packed, and hauled Zucca's grapes in 1978.

1. Hickam provided all the equipment necessary for these operations.

2. Zucca contacted Hickam to do the picking, packing, and hauling. It appears that Hickam and Zucca jointly decided when to pick, with Hickam having the final say in order to coordinate the picking crews and packing house operations. Hickam appears to have then assumed full control over, and responsibility for, the picking, packing, and hauling

3. Hickam had ultimate authority over the employees involved. The employees worked under Gloria Verdin, Hickam's regular harvest supervisor. The employees went in when Hickam gave the word, and Hickam was the one the employees had to satisfy.

4. The rate paid to these employees seemed to have been set by Hickam, and acquiesced to by Zucca. Hickam paid the

employees on Hickam payroll checks from his payroll account. Hickam made all necessary deductions and paid all required payroll taxes. Hickam kept the payroll records for these employees. If there was any effect on a social insurance policy, Hickam's policy was the one affected.

5. Hickam billed Zucca by a single bill collecting a per box rate for packing and hauling, plus a labor and equipment charge for picking. This is more in the nature of a bill for services provided than simply for the provision of labor.

6. Hickam clearly had an opportunity for profit or loss via his control of the picking, packing, and hauling operation. Therefore, Hickam must be considered to be the agricultural employer of the 1978 harvest employees at Zucca's.

V. Hickam's Bad Faith Bargaining.

1. Introduction.

On October 21, 1975, the ALRB conducted a Representation Election at Hickam, pursuant to an election petition filed by the UFW. Hickam contested the election, but the Board certified the UFW on July 12, 1977, as the exclusive bargaining agent of Hickam's employees. (R.H. Hickam, 4 ALRB 73 (1978)). Hickam continued to refuse to bargain during the time he appealed the Board's order. On December 28, 1979, the 5th District Court of Appeals denied Hickam's appeal. On March 3, 1980, the UFW again requested to negotiate with Hickam (GC 37). On April 3, 1980, bargaining between Hickam and the UFW began. It is stipulated that the parties met on April 3, April 28, May 27, June 9, 23, July 14, and 24, August 1, 8, 13, 22, 29, September 11, 12, 17, 19, 24, and October 9, 24, 1980. Since the negotiations commenced, there have been filed against Hickam the four unfair labor charges which concern us in the instant case.

The qualifications of the negotiators were quite disparate. Emelio Huerta, for the Union, has been employed by the Union since 1975. He has worked mainly at the Union's La Paz Headquarters, and also in Delano and Oxnard. He has been a Union negotiator for two years, since 1978. He was trained at the Fred Ross Collective Bargaining School in 1978 for about one year. His parents are also UFW negotiators. During his training, Huerta participated in approximately 12 negotiations. He has conducted approximately 12 more negotiations on his own, in the Oxnard and Delano areas. Huerta negotiated the Hickam contract from April, 1980, until the end of July, 1980. Deborah Miller was assigned to the Hickam negotiations in mid-July, 1980. She has been employed by

the UFW since 1974. From 1974 until 1976 she was a boycott organizer From 1977 to October, 1979, she was a paralegal for the UFW in the Delano area. She dealt with unfair labor practices and assisted in negotiations with respect to both contract and unfair labor practice settlements. From 1979 until May, 1980, she organized boycotts. She was then assigned to negotiations. She worked on approximately five bad faith bargaining cases as a paralegal. She was familiar with Hickam's ranch operations because of an unfair labor practice charge filed against Hickam on which she worked. While she was a paralegal and during her training as a negotiator, Miller attended negotiations and worked with other negotiators for several contracts. She was assigned to the negotiations department in July of 1980. The Hickam negotiation is one of the first she was responsible for as a sole negotiator. Before becoming the sole Union negotiator for the Hickam negotiation, Huerta briefed her on everything that had occurred in the negotiations.

For the company, Michael Hogan started the negotiations. Hogan is a shareholder in the firm of Littler, Mendelson, Fastiff & Tichy, based in San Francisco. Hogan's office is in Fresno. Hogan has had extensive experience in labor negotiations, including several farm worker's contracts. Hogan participated in the first four negotiating sessions, after which he was replaced by Spencer Hipp. Hipp also is a member of the firm of Littler, Mendelson, Fastiff & Tichy. He has worked for the firm since November, 1979, when he was first licensed to practice law in California. Hipp has assisted the chief negotiators for the Padula contract (UFW contract), Retail Clerks, and Butchers Union contract. The Hickam negotiation is the first for which Hipp has beensolely responsible. He was assigned to the Hickam negotiations in

mid-March, 1980. Hipp was present at the first four negotiating sessions, at which Hogan was the lead company negotiator. Hipp was the company negotiator for the rest of the meetings.

I found Ms. Miller's and Mr. Huerta's testimony to be internally consistent and presented in a candid, sincere, straightforward, unhesitating manner. They were familiar with the areas in which they were questioned and responded in an honest and fully professional manner. The testimony of both Mr. Hogan and Mr. Hipp, by contrast, was in large measure self-serving and I felt lacking in credibility. Hogan and Hipp sought not only to establish their credibility as witnesses, but also attempted to establish their credibility and effectiveness as the Respondent's representative. They were members of the firm which argued this case on Respondent's behalf and Respondent's representative at the bargaining table. The American Bar Association frowns on such a practice (Cannon 19 A.B.A. Canons of Ethics; See also French v. Hall, 119 U.S. 152 (1886)).

2. Failure to Provide Information.

On March 3, 1980, the Union requested Hickam to commence negotiations. They requested information, including Hickam's business organization, his tools and equipment, benefits he gave his employees (e.g., jury duty pay, medical insurance, vacations, etc.,), crops, production dates for each block of land, types of pesticides and chemicals used, employee lists (giving names, social security numbers, original dates of hire, job classifications, wages, hours, holidays, and vacations). Information was requested for the years since the Union had been certified, i.e., 1977, 1978, and 1979, and was requested to be provided within ten days (GC-37).

On March 20, Hip called David Burciaga to ask if the company could delay providing him with the information until March 31. The reason given was that Hogan, the company negotiator, was tied up at the moment. Burciaga said to call Huerta, the Union negotiator. Hipp did so, and Huerta said a delay until March 31 was okay, but he wanted the information as soon as possible. Hipp sent Huerta a letter confirming this conversation (GC-39) On April 1, Hogan called Huerta and gave a general and inadequate oral response for the inforamtion requested.

A. Payroll Information.

The Union's March 3 request included a request for the names of employees, their Social Security numbers, original dates of hire, job classification, wages, hours, and benefits for the years 1977 through 1979. On April 1, Hogan told Huerta that the payroll records were "voluminous," and that the company was consolidating them, but that Huerta should get them soon. On April 3, at the first negotiating session Hogan gave Huerta a written response to the then information requested, which merely reiterated the information given in the phone call of April 1st (GC-40). On April 3rd, Huerta rerequested the original "raw" payroll information and stressed the need for it. Hogan said that he was in the process of getting that information from Hickam, but there was a "problem" with the payroll information: some of the records were for Hickam's employees working on property owned by others. Hogan's testimony that he did not say this is not convincing, in light of the fact that this is exactly what the "problem" with the records were, and the fact that in summarizing those records, the company deleted that information. Huerta also asked for information concerning vacations at

the April 3rd meeting. Hogan said that paid vacations did exist, but he didn't know anything else about it. He said he would get the information. Huerta again requested a list of employees' names and addresses. Hogan said the company would provide them, but did not say when. Hogan verbally stated some pay rates, including $3.35 for general labor? $4.00 to $4.35 for tractor operations; $3.75 to $4.00 for irrigation; $3.75 to $4.25 for steady employees; $3.55 for field employees (seasonal pruners, etc.). On April 21st, Hogan told Huerta in a letter (GC-42) that copies of the 1977 to 1980 raw payroll data would be available at the next meeting.

At the next meeting, on April 28th, Hogan informed Huerta that the company was separating work done on Hickam's property from work done on other property that Hickam had paid for as part of a "payroll service." He said the company was summarizing the work on Hickam property and that that would take about a month. He said the company would send it when it was completed. Hogan did bring the originals of the raw records to the meeting, and said that Huerta could look at them there. Huerta was not allowed to take the documents with him, and had insufficient time to properly use them there. The company took the documents with them at the end of the meeting. At the meeting, Huerta again requested raw data for all employees on all properties that were on Hickam's payroll. The raw data that Huerta was shown was unintelligible. It was often impossible to tell job classification, pay rate, location of the operation, the crop being worked on. The company never offered to help interpret this data. Huerta offered the Union's help to extract the information from the summaries, in order to get the records in less than one month, but that help was not accepted. Huerta then asked for an employee list

with names, addresses, social security numbers, and original dates of hire to be sent before the end of the month. Although Hogan told Huerta the company would stay and go through the records with Huerta at the meeting, and answer questions, this offer was less than helpful. These records (GC-10-17) are both voluminous and confusing. It would have taken much more time than was available to go through those records. Hogan testified that Huerta acquiesed to the delay in providing the records. This seems unlikely in view of the importance/with which the Union viewed the payroll documents. Any acquiesence by Huerta (Huerta totally denied acquiesing) would only have been reluctant and qualified at best. Therefore, I find that Huerta did not acquiese to the unnecessarily long delay that resulted.

On May 1, 1980, Hipp sent Huerta a letter (GC-43), including an employee list, with names, social security numbers, and addresses of employees. Huerta had asked for this on April 3rd, why so long. This list included none of Hickam's steady employees, except Fred Stroud, nor the Almarals, who had been working for Hickam for years. The list was both incomplete and inaccurate. Many of the addresses were wrong, and not all employees were listed. Gloria Verdin was listed twice with different addresses. Many of the addresses given were General Delivery addresses. Since the Union intended to use these addresses to locate and contact employees, General Delivery addresses are not very useful. The original dates of hire (which were requested) were missing. Most of the employees listed were not current employees. Despite attempts to do so, the Union was unable to reach any current employees using this list.

On May 2, Hipp sent Huerta another letter (GC-44) saying that the list sent the previous day came from information other than the raw

record, and was likely incomplete. Although this letter suggests that there was an agreement that the summaries were to be done within a month, Huerta testified that he never agreed to this; he was just told. Huerta stated that he wanted the records as soon as possible.

On May 20th, Hipp called Huerta to inform him of a further delay with the payroll information. Hipp suggested that perhaps it would be better to provide the information on a year-by-year basis (as was actually done), and thus get it to Huerta as soon as possible within the limits of what Hipp described as "necessary delay." No new arrival dates were given. Huerta again offered the Union help in extracting the necessary information, but this was apparently not accepted. Huerta re-requested all original payroll documents as soon as possible.

At the third meeting on May 27th, Huerta still had no payroll information. He was told that the 1977 summary was ready. Although the original was at the meeting (GC-22), there were no copies. The company took the summaries with them when they left. Hogan said that he would copy them and send Huerta a copy. Hogan said Huerta could compare the summaries with the raw data if there was any problem. Huerta re-requested the raw data, and Hogan agreed to send copies. Hogan said he would do it as soon as possible. At the meeting, Huerta looked over the summaries, Hipp said the only difference between the summaries and the raw information was that the summaries included only work on Hickam's property. Huerta asked the question with regard to one of the summaries, but Hickam was unable to answer it. Huerta found the summaries to be unsatisfactory; they gave no indication of the crop, the job being done, or the location.

Huerta asked what Hickam's connection was to the other properties that were being excluded. Hickam said that he loaned employees to them

and then did the payroll as a convenience. Huerta stated the Union's position is that it represents all employees on Hickam's payroll. Hickam then said that he would not be doing the payroll for others in the future. Huerta then asked for a list of employees and their job classifications again. Hogan said the company would send them and Huerta stressed the need for the requested information "right away."

On May 28th, Hipp sent Huerta a copy of the 1977 raw data and the 1977 summary (GC-10, 14, 22; GC-46). There was no company offer to explain these, and Huerta was unable to tell what job was being done, what crop was being worked on, or the location.

At the fourth meeting on June 9th, Huerta was informed that the 1978 raw records and summaries were ready. Although the originals were there, the company did not provide copies. Hogan said he would mail copies to Huerta. Although Huerta made no further request to inspect the raw payroll records (because he said the previous requests were "already pretty clear"), Huerta did re-request an employee list with the original hiring dates. The company said they would send it.

On June 10th, Hogan sent Huerta a list of employees with original hiring dates (GC-40). He also sent the 1978 summary (GC-23). He did not send the 1978 raw data, but rather asked if Huerta wanted it. Huerta found the employee list to be the same one as before, except with original hire dates added. Thus, it was incomplete; the steady employees were not listed, and the addresses were incorrect and/or unsatisfactory. Huerta also found the summaries to be unsatisfactory. They only included work done on Hickam's property, and were thus incomplete, and were unintelligible (there is no clue to the location, job being done, or crop). On June llth, Huerta called Hogan and re-requested the 1978 raw data. Hoga

said he would send it. Also on June llth, Hogan sent Huerta a letter (GC-50) saying that Hogan had asked Hickam for the 1978 raw data, and that as soon as Hogan got it and copied it, he would send it to Huerta. On June 17, Hipp sent the 1978 raw records (GC-11,15) to Huerta (GC-51).

On June 15th, Huerta went to Hickam's ranch to try to contact employees. He talked to the Almaras, who were the only employees he could find. Interestingly enough, the Almarals were not on the employee list provided by the company.

At the fifth session, on June 23rd, Hipp told Huerta that the 1979 summaries and records were ready. The records and summaries were not at the meeting though, and there was no indication when they would be forthcoming. On June 25th, Hipp sent Huerta the 1979 raw payroll records and summaries (GC-12, 16, 24; GC-53). It is now approximately four months after they were requested. Understandably, the Union found the records to be unsatisfactory; they were incomplete and/or unintelligible.

At the seventh meeting on July 24th, Hipp asked the Union for an economic proposal. Huerta explained that the company's pay increase (discussed below) and the difficulties in making sense out of the raw data had made development of an economic proposal difficult. Huerta then told Hipp that he wanted to know where and when employees would be working in advance, so that the Union could contact them. Hipp did not know, and Hickam was not there to provide the information. When Hickam arrived later, Huerta again asked for the information. He mentioned that in the past, the Union had either been unable to get that information or had been given inaccurate information. Huerta also pointed out that the Amarals were not on the most recent employee list. Hickman seemed surprised, and admitted that they were almost steadies. Debra Miller,

who was at this session and who had been assigned by Huerta to develop economic proposals, testified that she had been unable to contact employees because the employee lists supplied by the company were incomplete and inaccurate; the addresses were rarely correct. When Hickam arrived and was asked, he provided a rough schedule of the up-coming harvest operations. The company's most recent employee list (GC-40) is clearly incomplete when compared to the 1979 summary cards. The list has approximately 63 employees? the cards list approximately 280. Hipp suggested that when the Union wanted to contact employees that they simply call ahead and get information where to go. Huerta said that the Union had tried that without success.

Between the seventh meeting on July 24th and the eighth on Augst lst,Deborah Miller reviewed the payroll information. The original data is sometimes two or three sheets wide, and had to be xeroxed in sections. The copies provided to the Union were just stacked without any indication of how to connect it physically or if it even did connect. Nether Miller nor Huerta were told about their chronological pay ledgers or the individual compensation sheets until the October 10th Subpoena Duces Tecum. In the raw data, it is often impossible to figure out locations of operations, jobs being done, numbers of employees working, operations, hours, or crops. It was not clear how the summaries related to the raw data; they just did not match up. Hickam just passed it off as clerical errors. Miller later realized that it was because all the custo harvest data had been left off of the summaries. The payroll data was often just scraps of paper with a first name and number of hours (for steadies). (GC-10).

Miller had been unable to find out or figure out the names and addresses of the plum harvest employees (the plum harvest was then in progress). On July 25th she called Hipp and asked for it. He said he would provide it at the next meeting. Miller wanted it sooner. Hipp agreed to call the company and get it directly. Mrs. Hickam then told Hipp she would prepare the list and Miller picked it up one or two days before the next session (GC-59). The list did not include addresses, and Miller objected. Mrs. Hickam said that there were no addresses, and that maybe Hector had them. While she was at the Hickams, Miller tried to call the steadies that she had addresses for. She tried to contact Tim Meek and Darshan Gill, but had been given wrong telephone numbers.

At the August 1st meeting, Hip gave Miller a seniority list (GC-60). He confirmed Miller's receipt of th plum harvest employee list, but Miller said that it had no addresses. Miller asked why all the original hire dates on GC-60 were all 1979. Hipp said that these were all 1979 employees (there were approximately 267). In the summaries there were no custom harvest employees. Miller asked about 1980 employees, but Hipp did not understand that a seniority list should continue through to the present. Hipp said he would get the 1980 employees' names and addresses. He did not say when. These lists were to include the steadies, the plum harvesters, and the grape pruners. Miller later found out about other 1980 employees that Hipp was not aware of (e.g., thinning employees). She found this out from Hickam. Miller found the seniority list to be unsatisfactory because it was not correct and did not include all employees. Most of the addresses given were Post Office Boxes or General Delivery, and thus did not assist the Union

in contacting employees. Those addresses given for steady employees wer the same as on the old list, and thus incorrect (at least for Gill Darshan, Tim Meek). A complete list of 1980 employees and addresses was never provided to the Union.

At this meeting, Miller re-requested hours and rates paid for all of Hickam's property and for custom harvest work, and referred to March 3rd information request. In the records, there appears to be vacations and bonuses. The company had said they gave no benefits, except as per the Industrial Welfare Comission orders. Hickam said that the steadies got vacations and bonuses, and these varied with seniority and money available. Miller asked when all the requested information would be ready, and was told next Thursday. Hipp's testimony that the benefits information had already been given to Huerta is incredible in light of GC-40. GC-40 is the company's initial written response to the Union's request for information. In response to the Union's inquiry about employee benefits, GC-40 says that employees only get what is required by the I.W.C. (GC 36). The I.W.C. does not specify vacations; the UFW had therefore assumed that Hickam gave none. Thus, Hipp's statement that the Union already had the information about vacations that now turned out to exist cannot be taken seriously. Hipp either was lying, or had absolutely no idea about what the UFW had been told earlier and thus was negotiating without vital information.

Between the August 1st and August 8th meeting, Miller talked to Hickam about going to the ranch to talk to his steady employees. She asked where they would be that week. Hickam said they were not there, that they were at another ranch "farmed out."

At the August 8th meeting, Hipp supplied some information, but this included no job classifications or rates, as requested, except for general labor. Hickam was not there, and Hipp was unable to answer Miller's questions. The information was not in the raw data. Miller re-requested the information and asked about a 1980 seniority list. Hipp said they were still trying to get it, but did not say when it would be provided. Miller also requested the addresses for all 1980 employees. The company said they would get them, but again did not say wher

At the August 13th meeting, Hipp provided the 1980 plum picker list (GC-65), with addresses, and also the grape pruners, as requested. This list was only partially satisfactory. The addresses included many Post Office Boxes, which were useless for contacting employees. The list given of grape pruners was incomplete. Miller later got a list twice as long. Hickam said later that the longer list might include some grape planters, but this means the information was ambiguous. Miller re-requested the addresses of all 1980 employees, not just the plum harvesters and prumers. Hickam had told Miller that the thinners and pickers were missing. The list (GC-65) was the original copy and Hipp wanted to take it with him and mail a copy to Miller. Miller insisted on taking it with her, and mailed the original back to him after she copied it. The company often showed up with only originals and no copies. Miller also requested the original dates of hire on all current employees.

Miller again asked Hickam questions about the raw data: why the summaries did not match. Hickam said it was clerical error. It later became apparent that all custom harvest information had

been left out when, as Miller put it, the records were "reduced to fuzz." Miller asked for the raw information about vine tying. Hickam told Miller where to find it, on a "scrap of paper." Miller was unable to find it. Miller then asked for all rates and job classifications for custom harvester work. Hipp said that that was irrelevant to the negotiations and refused to give it.

Bonuses were discussed at this meeting. The company agreed to keep giving bonsuses as in the past, but it was uncertain who got them in the past.

On August 15th, Hipp sent Miller a list (GC-67) of rates for various operations in response to Miller's request for job classifications and rates for 1977 and 1978. This list was incomplete. It did nto include all the classifications (swamping, pruning, and drivers are missing), and included no custom harvest work. On August 17, Miller called Hipp and requested a list of the peach harvesting crew, with addresses. The peach harvest was about to start. She specified that she wanted the list before the harvest started in order to be sure of contacting the employees. A letter dated August 18th (GC-68} confirms the phone call of August 17th. On August 19th, Hipp called Miller back with the information. At the August 22nd meeting, Miller was given a list of 1980 grape pruners. Hickam later said that some of those were planters. No addresses were on the list. Hipp said the list included 1980 employees up to that date. There were no addresses, and the dates of hire often coincided with the date of last check. Hipp said that the addresses that were there were all the addresses the company had.

At the August 29th meeting, Miller once again asked him for a list of 1980 employee addresses. Hipp said they were working on it.

There was no indication when that list would be provided.

At the August 29th meeting, the company gave Miller a payroll list for the peach picking crew. This was in response to Miller's request of August 17th, before the harvest started. These names were not included on the list (GC-71) provided on August 22nd. The peach harvest was then over. Miller had requested this list specifically before the harvest began. Some of the addresses on this list are accurate and the Union was able to make contact with the employees through them. At the September llth meeting, Miller had some questions about the amount of over-time hours worked by some employees. Hickam was not there, and Hipp did not know the answer. Hipp said he would find out. At the September 12th meeting, Hipp tried to answer these questions, however, he was unable to do so. This information was not apparent in the raw data. Miller also asked for the 1979 vine tying rate. Hipp was not sure of the answer. Miller asked him to check since this information was not available in the raw data.

At the September 17th meeting, Miller asked for the total number of hours, total number of weeks, and annual pay for steady employees in order to assess the company's vacation proposal. This information cannot readily be extracted from the raw data. Hickam said that that was irrelevant, and that the steadies did not want the Union anyway. He said that "only Gus and Anna Almarals...and some dead-beats want the Union.

At this meeting, Miller requested the names and addresses of the Malaga harvest employees. The Malaga harvest was already over. She also asked for the original record from which the summaries were made for the steadies, in order to check the vacation hours since she felt it was impossible that the raw data had been used for this. She demanded whatever was used. Hipp said that she already had "what there is".

At the September 19ty meeting, Miller again stated that it was obvious that something else had been used to do the summaries for the steadies because week by week total hours cannot be extracted from the raw data. Hipp insisted that she had all the records there were. Hickam objected that the steadies would not be in the Union anyway. Hipp then said that the steadies would get whatever the past benefit was or whatever the contract benefit was, whichever was better. He said that Gus Almaras would qualify too. Hipp then said that as a result, Miller did not need anymore information.

Miller re-requested the Malaga employee list. Hipp still didn't have it. Hipp said the problem was with Hector, but that he would get it. He did not say when.

At this meeting, Miller also re-requested the addresses of the 1979 grape pickers. Only five of the addresses provided by the company were house addresses. Miller accused him of stalling, and of giving incorrect addresses.

On September 22nd, between the 16th and 17th bargaining sessions, Debra Miller filed unfair labor practice charge 80-CE-165-D, accusing the Union of bad faith bargaining, specifically due to the refusals to give requested information. At the September 24th meeting, Miller asked Hipp for information about employees who were not steadies but who got paid more than the general rate. She named specific names. Hipp did not know. Hickam was not there. Hipp said he would find out from Hickam. Then Miller re-requested 1980 addresses. Hipp said that Hector was working on it. Miller objected that Hector has been working on it since July. Hipp gave no indication when Miller would get the addresses.

On September 27th, Miller sent a letter to Hipp (GC-87), asking for job classifications and pay rates for custom harvest work during 1977 and 1980, and names and addresses of all custom harvest clients. She demanded this information before the next session. On September 30th, Hipp replied to this request in a letter (GC-89). Hipp said he was surprised, since Miller/already had the information she was requesting. Hipp refused to give any information about the custom harvesting operation.

On October 9th, Hipp gave Miller the answers to the questions she had asked with regard to the specific employees on September 24th. Some were truck drivers, some were orange workers.

At this meeting, Hipp provided a list of Malaga employees, with addresses (GC-97). He only brought the original with him. He had no copy to give to Miller, but gave her a copy the next day at the Subpena Duces Tecum meeting. Hipp also supplied the 1980 raw data (GC-13, 17). Once again the sheets were not assembled, but were just in stacks. At this meeting, Hipp also provided the 1977 summaries for the steadies. These had been left out of the earlier 1977 summaries. (GC-96). Miller asked Hipp for addresses for peach and plum employees. Hickam said that a list of Thompson employees would be provided as soon as the payroll was out. Miller asked for grape pruner addresses (GC-71). Hickam got upset and said they did not have that many pruners. He finally decided that some of the employees listed as pruners must be employees planting grapes at HMZ. Miller never had gotten the addresses requested (GC-71). Miller did finally get the list of plum pickers' and peach pickers' addresses. At this point Miller still has no address for Darshan Gill, one of Hickam's steady employees. She requested that.

At one point during the October 9th meeting, Hickam went out, and came back with Hector. Hickam said that Hector knew addresses. Hector said that the pruners' addresses were the same as the addresses for the plum workers. Miller compared the lists. The lists did not match. Hector brushed that off, saying they all change their names. He said that that was all he had.

On October 10th, Miller was present at a meeting in the Fresno office of Littler, Mendelson when the company produced documents pursuant to a Subpoena Duces Tecum that Miller had never seen before. These included the individual compensation sheets and the chronological pay ledgers. (GC-18-20, 25-27). After looking them over, Miller realized that these were the source of material for the summaries and that was why the summaries did not match the raw data. Mrs. Hickam also present, explained the raw data, and cleared up much of the confusion. Miller now learned many details of the custom harvester operation. The company had never told the Union or Miller of the existence of this information. Although this information was not in the exact form that the Union wanted, it was much clearer, and much more useable than the raw data the company had provided. At the meeting, Miller asked Hipp for copies of the 1980 raw data. Hipp said he would send it. On October 17th, Miller called Hipp and requested the same payroll documents that were produced pursuant to the Subpena Duces Tecum. Hipp said "No", since that was all custom harvest material. He said it was produced for the hearing, not for negotiations. Miller objected, saying that those records were much clearer than the raw data. She said she would at least like to see them. Hipp said "No". These payroll records (the individual compensation sheets and the chronological pay ledges) actually covered all operations

that were on Hickam's payroll, including operations on Hickam's own property. The Union had earlier conceded that all of these operations were covered by negotiations.

On October 18th, Miller sent a letter to Hipp (GC-100), asking before the next session for the chronological pay ledgers and the individual compensation sheets.

At the October 24th meeting, Miller asked for a continuing up-date on 1980 payroll information. The company said they would provide that. She also asked for hours and rates for the Malaga stripping at the vineyards. Hipp said he would check his notes and give any data that was not already provided. She had previously asked for hours and rates for the Thompson harvest.

On October 29th, in a letter to Miller, Hipp provided some of this information. The hours for the Thompson harvest were never provided; they were never kept even after Miller requested that they be.

In an October 30th phone call, Hipp proposed that the company pay the Emperor harvesters $0.30 per box. Miller called some of the employees and found they were already being paid $0.35 per box at El Dorado. The payroll documents indicate that at one point $0.40 a box was paid on October 31st.

In one of the last bargaining sessions, Hipp claimed that the company simply couldn't afford to pay what the Union was demanding, and officer to open the company's books. Hipp specified that the examiner must be a CPA or a Trust Attorney.

On November 25th, Miller called Hickam to set up a time to look at the company books. Hickam asked if the examiner were a CPA. Miller said "No". Hickam said he would check with his accountant and

with Hogan, who had by this time replaced Hipp, about it.

On December 4th, Miller asked Hickam again about looking at the company's books. Hickam said not without a CPA or a Trust Attorney. The examiner that Miller had lined up was a Union bookkeeper, who was familiar with such bookkeeping practices.

On December 10th, Miller sent Hogan a letter (GC-114) requesting permission to inspect the company's books. She said she had a qualified person available. On December 15th, Hickam said he wanted to set up a time to let the Union to look at the company's books.

At this point the Union still had not received a complete list of 1980 employees and addresses. Original dates of hire were not clear. No rates had been given for any custom harvest work. The chronological pay ledger and the individual compensation sheets had been made available only as a result of my determinations. At this point the request to examine the company's books was postponed until after Christmas.

On January 6, 1980, Miller again asked Hogan to set a date to examine the company's books (GC-115). On January 16th, Hogan finally responded, but no date was arranged for the Union to look at the company's books. (RX-C).

These negotiations took approximately seven and one-half months before they were broken off. It is clear that the individual compensation sheets and chronological pay ledgers existed at the beginning of negotiations. It is clear they contained relevant information. The Union was not told of the existence of these records. When the Union learned of their existence and asked for them, the company refused to provide them.

I find the creation of the payroll summaries was unnecessary. This information already existed in the chronological pay ledgers and the individual compensation sheets. The delay created by the manufacturing of the summaries was thus equally unnecessary. The manufacture of the summaries delayed the production of the raw payroll records, and that appears to have been their purpose.

Although information on past employees may have been beyond the company's reach, the company clearly had it within its power to acquire and provide to the Union the names, the social security numbers, and street addresses (residential addresses) of all employees from the time that information was first requested on March 3, 1980. The fact that the company did not do so can only be ascribed to either extreme neglect, or actual intent on its part.

The operation of several hundred acres of agricultural land requires a certain minimum amount of organization. Certainly the manager must know what jobs are in progress, and which jobs are due to be performed next. Yet when the Union asked for job locations in order to contact employees, they were rarely able to get accurate information. This can only be ascribed to the company's recalcitrant attitude.

It is clear that information which was provided to the Union was often incomplete, unclear, or misleading. It is clear that a good deal more accurate and complete information existed than was supplied to the Union. The fact that this information was not provided can be ascribed only to the company's conscious decision to avoid its duties to bargain in good faith.

B. Production Information

The Union's March 3rd request for information included a request for locations and acreage of Hickam's land, crop, total yield, yields per block of land, and work schedules. On April 1st, Hogan called Huerta, and provided only some of this information. Began said that Hickam owned 50 acres of Thompsons, 140 acres of Emperors, 50 acres of nectarines, 15 acres of peaches, and 40 acres of plums. On April 3rd, Hogan provided that information in written form (GC-40). However, some of the information was different than that provided on Aprkl 1st. GC-40 specifies only 35 acres of Thompsons, only 25 acres of Emperors, and 10 acres of Red Malagas (which were not claimed before), and the rest as provided on April 1st. As of April 3, 1980, Hickam actually owned 25 acres of Thompsons, 68 1/2 acres of Emperors, 13 1/2 acres of Red Malagas, 74 acres of Flame Seedless, 30 acres of nectarines, 14 acres of persimmons, 15 acres of peaches, and 40 acres of plums. Thus, neither of Hogan's accounts of Hickam's property were accurate. Hogan, however, claimed on April 3rd, that the April 1st, information had been corrected.

Huerta found this information to be unsatisfactory, and incomplete. Hogan had not provided yield, yields per block, work schedules, or locations.

Hogan later said that the information he provided earlier with regard to Hickam's crops, and acreage was wrong, that there were actually more grapes.

The raw payroll information provided by the company at the April 28th meeting did not provide any of the production information requested. The jobs, locations, and crops, were impossible to ex

tract from these records.

At the April 28th meeting, Huerta asked for maps of Hickam's property. Hogan said he would provide them.

On May 20th, Hipp called Huerta to inform him of the further delay on the payroll information. At that time, Huerta requested all original payroll documents, and production data.

On May 27th, Hogan provided Huerta with the 1977 raw data and summaries. These shed no light on production. There was no indication of the crop, the job, or the location.

At this meeting, Huerta again requested both per block and per crop production data. Hogan said the company would send it. Huerta stressed the need for that information "right away".

On May 28th, Hipp sent Huerta the 1977 raw records and summaries. These records gave no useful production information. They cast no light upon what job was being done, the crops or the location. This was also true of the 1978, 1979, and 1980 raw records and summaries when they were provided.

At the June 9th meeting, the company had maps of company property. These were originals only, and Hogan said he would send copies to Huerta.

On June 10th, Hogan sent Huerta information (GC-49). This included a map of Hickam's property (there is no map attached to GC-49; but the testimony is clear that there was a map attached when that letter was received). This letter also included the 1978 summaries, which cast no light at all upon production.

On June 25th, Hipp sent Huerta the 1979 raw records and summaries. These failed to cast any light upon production. On July

24th, Huerta told Hipp that he wanted to know where and when employees would be working, in advance. Hipp didn't know. Hickam was not there. Towards the end of the meeting, Huerta made this request again. He explained that in the past, the Union had been unable to get the information or that when they were able to get something, the information was inaccurate. They were unable to contact employees using this information. Miller said this information was essential, because there was no ranch negotiation committee, and the employee lists the company supplied were usually incomplete and inaccurate; the addresses were rarely useable. Hickam came in late, and generally outlined the up-coming harvest.

When Debra Miller was assigned to the Hickam negotiations, Huerta assigned her to develop economic proposals. He tried to do this using the raw data that had been provided, but it was impossible to determine locations, jobs being done, number of employees working, operations, hours, or crops. The payroll information often consisted of mere scraps of paper with a first name and the number of hours on it (for steadies). The summaries were no more clear. It was never clear how the summaries related to the raw data. The summaries did not match the raw data since all custom harvest work had been left off of the summaries.

At the August 1st meeting, Miller asked why the records showed employees working with persimmons. The Union had not been informed of any persimmons owned by Hickam. Hickam stated there are persimmons and gave the acreage. Miller then asked for alist of crop schedules for all crops, for the whole year. She also requested production data, i.e., hours, yields, and rates paid. These were needed to translate piece rates into hourly rates for economic proposals. She requested this for custom harvest work as well. In doing this she referred

to the original March 3rd information request.

At the August 8th meeting, Hipp supplied a map of Hickam's property, crop schedules, the schedule of production for 1979 (GC-64). Yields were written on the map in Hickam's and Miller's handwriting for 1979 and 1980. This information was not satisfactory. No hours or rates were given, and these are necessary to calculate hourly rates for piece rates. The yield figures were very round, and obviously estimates. When Miller commented on that, Hickam got out truck tickets and changed the figures (all figures were changed upwards) No job classifications were given. The rates that were given were for general labor, not for any other work. Hickam's acreage on this map was approximately 260 acres (which is accurate). The March 3rd request response said that Hickam only owned about 150 acres. This information was purely for land owned by Hickam; no information was provided with respect to The Vineyard (which Hickam leases) or custom harvest lands. Miller asked for the missing data. Hickam had left early, and Hipp didn't know the answers. Miller re-requested the information. Miller also asked for information with regard to the persimmons and nectarines, which was missing from GC-64. Hipp did't know these answers either. Shortly afterwards Hickam returned, and answered the questions about the persimmons and nectarines.

At the August 13th meeting, the company indicated that the Emperor harvest would take about six weeks. They had earlier indicated that it would take only a day or two.

On August 13th, the Union presented its first economic proposal, but proposed nothing with respect to the Thompsons, because the Union still didn't have the necessary information. Miller stressed

the need for production information in order to calculate hourly rate from piece rate. Hipp, referring to the raw payroll data already provided, told Miller she already had the information.

Miller had always been led to understand that the peaches were picked on a piece rate basis. On August 13th, the company informed her that they wished to pick hourly. When Miller objected, that this looked like it would result in a cut in pay for the employees, Hickam got mad and called the proposal ridiculous. He said it would take a month to respond, and that he had things to do and could not meet past 5 o'clock anymore, because he had "dogs to feed". At that point, Hickam walked out. Miller patiently explained Hickam's duty to bargain to Hipp.

During the August 13th meeting, Miller asked how long it took to do some operations. The raw data had not been helpful in answering these. This again was the sort of information the Union had requested in March. Hipp said it was impossible for the company to provide such detailed information, to reconstruct a season. He said the company didn't keep such records, and that if it was not in the raw data, it did not exist. Miller than asked for production data for 1977 and 1978 and for any property with crops on it. She also asked questions about the Emperor harvest operation. The rates were not apparent from the raw records.

On August 15th, Hipp sent Miller a letter (GC-67), including rates for various operations on various crops, and the approximate time of the year of the operation. This was in response to Miller's request for job classification and rates for 1977 and 1978. This information was not satisfactory. It was incomplete; not all classification:

were there (e.g., swamping and tree pruning), and didn't include any custom harvest work.

On August 22nd, Miller requested Thompson harvest information. Hipp did not know the answers, and Hickam was not there. Hipp said he would ask Hickam. When Miller referred to the raw records, Hipp said they were beyond his understanding. Miller then asked questions about the Emperor harvest. Hipp could not answer those either. Hipp went and found Hickam and brought him back. Hickam explained the questions about the Thompson harvest, and most of the questions about the Emperor. Even Hickam could not figure out some of the raw payroll notations. Miller said she had to know everything.

Hipp then provided the 1977-78 production information (GC-71). This information was incomplete. There was no way to calculate hourly rates from piece rates. The yields given looked like estimates. When Miller pointed this out, Hickam got out the truck tickets and changed the figures.

Hickam and Miller tried to establish which jobs were paid by piece rate and which were paid hourly. After the discussion, Miller was still not clear about it.

Between the August 22nd and August 29th meeting, Miller went to the Tulare County Tax Assessor, and discovered Hickam had an interest in H&M and HMZ. The company had never told her of these. At the August 29th meeting, Miller asked about these properties. Hipp said that Hickam did not have a controlling interest in either one, and that therefore they were not covered by the negotiations. Hipp refused to answer Miller's questions about H&M or HMZ.

Miller then asked when the table grape harvest was to start, and Hickam said they would start about September 21st or the 28th. Hickam said the Malagas were being harvested now. He said the Thompsons were due to start about September 12th. This was the first time that Miller had heard of Hickam's owning Malagas.

Hickam arrived at the August 29th meeting late. When he arrived, Miller asked him about H&M and HMZ. Hickam told her about his ownership interest, and then when Miller asked for more, Hipp refused to allow Hickam to answer. Hipp said it was irrelevant to the negotiations because Hickam's interest was not controlling.

Miller then asked about the next harvest operation. Hickam said it was Malagas with Thompsons soon after. Miller was confused about the Malagas. Hickam explained where the Malaga's were, and what the acreage was. The Malagas are grown at the leased piece known as The Vineyard.

At the September 12th meeting, Miller asked whether Hickam was going to strip it for this year, and whether Hickam would have Malagas next year. Hipp was unable to answer. Hickam was not there; he was at a dog show. Hipp explained that some of these operations were decided upon at the last minute; based upon the way the crop, or the harvest developed. He said that the leased piece, with the Malagas, was up for sale, and so it was unknown whether Hickam would have Malagas next year.

At the September 17th meeting, during a discussion of contract language, Hickam insisted upon using the term "table grapes'* in the contract because that would also cover Almerias and Calmerias. Miller had not been aware of Almerica or Calmeria vineyards on Hickam's prop-

erty before. She understood that he had none. Hickam does not have any Alnteria or Calmeria grapes, but some of the custom harvested lands do.

During the September 17th meeting, Miller asked whether the Thompson Harvest had started. Hipp said that it had not, that the company was waiting for the wineries to call, and could not pick until then.

At the September 19th meeting, Miller was given Thompson yield information. The yield was given for all of Hickam's Thompson land as a total. Miller was also given the rate paid and the hours worked. The Union had wanted it by blocks since Hickam's land is naturally divided into three parcels of Thompsons. This, however, was better than any information the Union had received to date. At this meeting, Hickam informed Miller that the Thompson harvest would likely start the next week. Hipp also explained that the company could not provide production information per block because of the way the harvest was done, and the way the company kept records.. Hipp's explanation is not convincing. It is clear that very accurate estimates could be made available, and later were made available, and that this problem was magnified out of proportion by the company.

On September 22nd, Miller filed the unfair labor practice charge 80-CE-165-D, accusing the company of bad faith bargaining. A major component of this was the refusal of the company to give information,

At the September 24th meeting, Hipp informed Miller that the Thompson harvest was likely to start the next week. He also said that Emperors were due to start within two or three weeks.

On September 27th, in a letter to Hipp (GC-87), Miller requested production data per block of land, including custom harvest work. This is the same request that was made on March 3rd. She demanded this information prior to the next meeting. On September 30th, Hipp replied (GC-89). Hipp expressed surprise, and said that Miller already had the requested information. He refused to give any custom harvest information.

On October 1st, Hipp confirmed the start of the Thompson harvest (GC-90). On October 2nd, Miller called Hipp and emphasized the need for accurate data on this harvest; i.e., per block yield, hours, and rates. Hipp said that per block yields were impossible because it would cause trucks to leave the field half empty. However, the truck tickets (GC 17 from the hearing in the make whole case 78-CE-8-D)[6] do not reflect this. These list only a single point of origin for each truck. Hipp was making mountains from mole hills with this contention. Fairly accurate estimates could, and later were, made. Hipp then stated that it was within the company's rights to do the harvest in the usual way, that there was no reason to do it the way the Union wanted. Hipp's tone throughout this dissertation was antagonistic and belligerent, though there was no need to assume this attitude. Miller then asked for the harvest duration. Finally, Hipp said that he would get it and phoned back later that day with the information.

At the October 9th meeting, Miller again explained the need for a per block yield of Thompsons. Hipp said that the company did not keep information that way, and had no way to do it. At this point

[6]It was stipulated in the hearing in the Make Whole Case 78-CE-8-D that exhibits used in that hearing and the hearing in 80-CE-105-D could be used as part of the record in either hearing.

Hickam asked if he could leave. Miller said he had better stay in case she had some questions. Hickam said "We're just arguing and I want to go". Hickam then left. Immediately afterward, Miller did have questions that Hipp was unable to answer. Hipp's testimony that Miller said that a total yield rather than a per block yield was okay is unconvincing in light of her repeated requests for per block yields.

On October 10th, at the Fresno meeting, Miller saw the truck tickets for the Thompsons for the first time. But the truck tickets had only one point of origin listed, thus making it possible to calculate Thompson yields per block. Miller asked Hipp for copies. Hipp said they had irrelevant information on them, and that he would make a summary. Miller then detailed what she wanted included on the summary. She pointed out to Hipp that the record was by blocks, and Hipp said "Oh yes, it was". When Miller eventually received the summary, it was incomplete and had no dates. Miller objected, and then got a second summary with dates. The company refused to provide copies of the truck tickets themselves, saying there was other irrelevant information on them. (Note: The truck ticket summaries are in GC-99).

On October 18th, Miller learned of the start of the Emperor harvest on the proceeding day. It was to last two days. The company previously estimated the harvest at four to six weeks before). She also received a copy of the truck ticket summaries (GC-99). GC-99 also stated that the truck tickets themselves would be available at the next session. The truck ticket summaries, as received were incomplete. There were no dates, which were needed to match with the payroll records in order to calculate hourly rates for piece rates. She also received

the 1980 raw data at this point. The crew sheets (approximately three sheets wide) had been done in segments and were stacked without any indication of how they went together or should be sorted.

On October 17th, Miller learned that Hickam was stripping Malagas. This was the first she heard of stripping Malagas.

At the October 24th meeting, Miller requested the Thompson harvest hours and the Malaga yields. Hickam said that he could not let the records go and that Miller was harassing him. Miller also asked for a map of the location of the Malagas. Hickam drew one (GC-103) of the vineyard. Miller then asked for records regarding the Emperors as those records became available —- i.e., a continuing up-date on the Emperor harvest. The company said it would provide that. It was at this meeting that Miller requested a revised truck ticket summary, this time including dates. Hipp said that he would check his notes and give any data that he had not already provided.

Miller then asked about the Griggs Ranch, and about HMZ's oranges. Hickam explained his interests in those.

On October 29th, Hipp sent the revised truck ticket summary and the Malaga's stripping yields to Miller. The hours for this Thompson harvest were still missing. They apparently were not kept.

On October 30th, Miller received a phone call from Hipp and learned that the Emperor harvest was going to last a couple of days beyond the couple of days originally scheduled. This was still far less than the six weeks that the company had indicated to earlier.

On November 6th, struck by an apparent anomaly in the information provided by the company, Miller demanded a list of all land leased by Hickam, its acreage, crops, lessor, job classifications, and

pay rates. (GC-108). On November 10th, Hip replied, specifying that Hickam leased only one piece of land, and that Miller already knew of it. (GC-109).

On November 12, the hearing in this instant case began.

As of December 15th, the Union still had not received production information on Hickam's peaches, or any of the lands he custom harvests.

It is worth noting that because of Hickam's "payroll service" and custom harvesting of crops on others lands, Hickam has fairly accurate production records of those lands. The company steadfastly refused to provide this information.

It is clear that the company could have honored within the initial March 3rd request, and provided more accurate and more complete information than it actually did. The fact that it did not do so can be ascribed only to either gross neglect on the part of the company, or to the hostility of the company for the Union.

3. Subcontracting and Custom Harvesting Information

During the second meeting, on April 28th, Hogan explained to Huerta that the reason for the delay in providing the payroll records was that they contained records of Hickam's employees doing work on the property of others. He said that the company was separating out, for the Union, that work which was done on Hickam's property. At this point, Huerta stated that he wanted the payroll information for all employees on Hickam's payroll. The raw payroll records, when Huerta finally received them, did include all of Hickam's employees. However, Huerta was not to receive these records for months (See the payroll information discussion, above).

At the May 27th meeting, Huerta asked what Hickam's connection was to these other properties. Hickam explained that all of these growers belonged to Mendelson-Zeller, and that Hickam lent employees to them and did payroll for them "as a convenience". Huerta stated that the Union's position was that it represented all employees on Hickam's payroll. At that point Huerta requested production data and payroll data for all properties pertinent to the negotiations. Hickam stated that he was not going to be doing payroll for the other growers in the future because it was too burdensome for his wife. Huerta stressed the need for the requested information "right away".

Huerta also asked for more specific subcontracting data. Hogan said he would provide it at the next meeting. At the next meeting, on June 9th, Hogan provided Huerta with a list of subcontracted operations. Huerta testified that that list satisfied the Union's request. The information was provided to Huerta orally, and the next day, June 10th, Hogan mailed the information in writing to Huerta. (GC-49).

However, at the June 23rd meeting, Huerta had questions about the subcontracting information. He apparently felt it might be incomplete. He asked the company about it, and the company said they would look into it.

On June 25th, Hipp mailed the last of the raw payroll records to Huerta. This was about four months after that information had been requested. Although these records did include information with regard to Hickam's custom harvesting activities, those records were unintelligible (see discussion of payroll information, above).

At the July 14th meeting, the custom harvester issue was raised by Hipp. Huerta suggested a resolution of the issue through the Board. No action was ever taken.

At the August 1st meeting, Hipp said the company had to be able to subcontract the Thompson harvest and the peach harvest because it sometimes over-lapped with the harvest of other crops, and the company had insufficient equipment to do both. Debra Miller asked for supporting documentation. Hipp said the company would provide it. At the end of the meeting, Miller asked when all the requested information would be ready. Hipp told her it would be ready Thursday, before the next meeting. However, this information was not provided until after the next meeting and it was two weeks before Miller received it. (GC-65).

At the August 8th meeting, Miller asked questions about subcontracting. Hickam was in and out of that meeting, and Hipp was unable to answer when Hickam was not there since only Hickam knew the information. Miller suspected that the sub-contracting issues was not as serious as the company insisted it was, and requested information about the company's subcontracting operations for the last three years. The company said it would provide that information. However, Miller later testified that she was not aware that the company ever did provide that information.

At the August 13th meeting, the company provided some subcontracting information (GC-65). At this point, Miller testified that this information satisfied the Union's requests.

At the August 13th meeting, Miller asked for all rates and job classifications for custom harvest work. Hipp said that was irrelevant to these negotiations, and refused to give it.

Before the August 29th meeting, Miller found out from the Tulare County Tax Assessor's Office that Hickam had an ownership interest in H&M and HMZ land. At the August 29th meeting, Miller asked questions about this land. Hipp refused to answer that and refused to let Hickam answer those questions. He said that since Hickam did not have a controlling interest in either of these partnerships, that the company did not have to discuss them. Miller explained that her questions related to the management of work on that land. Hipp remained adamant.

On September 19th, Miller filed the unfair labor practice charge 80-CE-165-D, which accused the company of bad-faith bargaining, and in particular of a failure to provide information.

On September 27th, Miller requested production information per block of land, including custom harvest work (GC-87). She also requested job classifications, and pay rates from 1977 to 1980 for custom harvest work, and the names and addresses of all custom harvest clients. She also requested management and work force information concerning the HMZ "160". Miller demanded that that information be provided before the next bargaining session. On September 30th, Hipp responded (GC-89). He said that he was surprised, that Miller already had all the requested information that was relevant to the negotiations. He refused to supply any information on custom harvest operations.

On October 10th, at the Fresno meeting, Miller and the Union, were first made aware of the existence of the individual compensation sheets and the chronological pay ledgers (GC-18-20, 25-27). These records contained the same information as the raw payroll records

that the company had provided, but in a much more coherent and organized form. They also reflected custom harvest work. Miller later requested these records, but the company refused to provide them.

In Fresno on October 10th, Mrs. Hickam reviewed the raw payroll records, and was able to answer many questions. Miller gained a great deal of custom harvest information at this session.

On October 17th, Miller called Hipp and requested the records that were produced on October 10th. Hipp refused, stating that, it was all custom harvest stuff. He said it had been produced for the hearing, not for the negotiations. Miller objected, saying that those records were much clearer than the raw data, and that she would at least like to see them. Hipp refused. On October 18th, Miller requested the chronological pay ledgers, and the individual compensation sheets. She demanded these before the next bargaining session. (GC-100). On October 23rd, Hipp responded (GC-102). He stated, in somewhat bellicose language, that the Union had "complete and accurate" information.

At the October 10th meeting, Miller complained to Hipp that Hector had interfered with her efforts to talk to the employees at El Dorado that morning. Hipp said that Hickam did not own El Dorado, and that anything that happended there was not Hickam's concern. Miller said that the Union considered Hickam a custom harvester there. Hipp said that Hickam was not a custom harvester, and that conduct on other people's property did not concern Hickam.

As of December 15th, the Union had received no custom harvest information from the company in response to its requests for

such information. The only information with regard to custom harvesting that the Union had, came, as a result of external pressure, primarily from the subpeona Duces Tecum. There is no evidence that the Company ever willingly supplied any information regarding Hickam's custom harvesting activities. While this can be attributed to the Company's position that Hickam was not a custom harvester, the custom harvesting issue obviously existed. The union took the contrary view that Hickam was a custom harvester. Nevertheless, the company made no efforts to officially clarify the scope of the bargaining unit, as had been suggested by Huerta in one of the early bargaining sessions. The company had never advanced a justification for not seeking a clarification.

C. Alleged Unilateral Pay Increases.

At the July 14th meeting, Huerta asked if it were true that Hickam had raised the wages for the nectarine pickers. Huerta had heard this from an employee. Hickam said "Yes he had, from $3.35 per hour to $3.50." Huerta asked if there were any other increases that he sould know of. Hickam said that he had raised the steady employees 25 cents per hour about a month early, on or about June 15th. Hickam had not told Hipp that he was going to raise wages either. Nor had he told the employees, saying that he intended it "as a surprise". Huerta explained that any unilateral pay change was an unfair labor practice, and that any changes must be negotiated with the Union. He also said that Hipp should be told before Hickam did these things, and Hickam said "okay".

On July 15th, the day after confirming that Hickam had indeed raised wages, Huerta filed the unfair labor practice charge

80-CE-105-D. (GC-18).

At the next meeting, on July 24th, Hipp conceded that Hickam's unilateral wage increase constituted an unfair labor practice, and asked what the Union wanted by way of settlement. Hipp suggested that the publication of a notice to employees, as ordered in Kaolan (6 ALRB 36), might be appropriate. Huerta said that the Union had not considered a settlement yet, and that he would respond if the Union wanted to settle.

At the August 1st meeting, Hipp again asked about settling charge 80-CE-105-D. He again suggested the Kaplan remedy. When this got no response he asked what the Union wanted in order to settle. Huerta said he wanted a contract.

On August 13th, as the peach harvest approached, the company began to negotiate with the Union a raise for the peach pickers, On August 17th, the company and Ms. Miller agreed to a rate for the peach pickers. (GC-68).

By the end of September, the parties had been negotiating wage rates for the Thompson harvest for several meetings. At the September 24th meeting, they were unable to agree upon a rate. On September 26th, Hipp called Miller and said that the Thompson harvest was imminent. He said that the company wanted to pay its last proposed rate. Miller said that was not acceptable. Hipp said again that the company wanted to pay that rate. Miller told Hip that if the company did pay that rate, the Union would consider that bad faith. Hipp then said that the parties seemed to be at loggerheads. In a letter to Miller on that same day (GC-86), Hipp declared that an

impasse seemed to exist. On September 30th, in a letter to Miller (GC-88), the company modified its last proposal by offering 50 cents more per gondola for some yields. On October 1st, the Thompson harvest started. The company paid its last proposed rate (GC-90). Hipp sent a letter to Miller to this effect on October 1st (GC-90). Miller did not receive that letter until October 3rd. On October 2nd, Miller called him. Hipp told her that the company was paying its last pro-had posal. On September 29th and 30th, Hipp had tried to reach Miller to negotiate the Thompson rate. Miller was out of town and could not be reached.

On October 15th, Hipp called the Union office in Delano seeking Miller. Miller was home sick. Hipp talked to Ken Schroeder, and explained that Hickam was going to strip Malagas and that the company wanted to pay $25.00 per bin. Hipp pressed Schroeder for a response but Schroeder said he had no authority. Schroeder did take a message. On October 16th, Hipp by letter confirmed the previous days phone call. (GC-98). On October 1th, Hipp phoned for Miller again. Miller was still sick. Hipp phoned Ken Schroeder. Hipp said the company was having trouble getting swampers for the Emperor harvest for less than $4.00 per hour, and that the company wanted to pay $4.00. The company's proposal previous to this had been $3.75. Schroeder said he would pass the message to Miller. On October 17th, Miller called Hipp and reproposed the Union's last proposal. She said that she wanted to negotiate the Malaga and swamper rates as part of a whole package, and not just one at a time, piecemeal. The Malaga stripping had never been discussed before. On October 18th, Miller received a letter from Hipp (GC-99), dated October 16th, confirmed that the Emperor harvest

would start on October 17th, and proposed a $4.00 swamper rate.

On October 30th, Hipp phoned Miller and said that the Emperor harvest would run a few days more. He said that the company wanted to pay 30 cents a box for the first pick and 35 cents for the second pick. Later that day, Miller talked to some of the employees, and found they had already been picking at 35 cents per box at El Dorado. On October 31st, Miller phoned Hipp and complained that the company was already paying more than it had offered the day before. She suggested that the company was not serious about reaching a contract, and that it always did whatever it wanted to. Payroll documents indicate that at one point on October 31st, the employees were receiving 40 cents per box at El Dorado.

It is clear that the rates Hickam paid were totally within his discretion, and varied from year to year, dependent upon prevailing rates and/or Hickam's whims.

D. Other Alleged Bad Faith Bargaining Practices.

1. Failure to Provide an Informed Negotiator

Hickam was represented at the negotiations by Michael Hogan and Spencer Hipp. Hickam testified that neither knew very much about his farm operation. Whenever Hickam was absent from the negotiating sessions (which was often during the later ones), his negotiators were unable to answer questions about the farm operation. The result was the frequent frustration and delay of the negotiations. On one occasion Hickam asked if he could leave and Deborah Miller, the Union negotiator, asked him not to in case she had some questions. Hickam left anyway. Hickam recognized Hipp's deficiencies. In November, after the bargaining collapsed, Hickam said to Miller that he wasn't going to do that to her again, meaning inflict Spencer Hipp on her again.

2. Regressive Bargaining

On September 17th, the company proposed a sliding payscale for Thompson harvesting (GC-82) (see Appendix A). Two of the components of this proposed pay-scale or proposal/were to pay $16.00 per gondola where yields were five tons per acre and a proposal to pay $14.00 per gondola where yields were seven tons per acre. On September 24th, the company presented a modified Thompson wage proposal (GC-84). While increasing the pay for some yields, the company offered 50 cts. less for yields of five and seven tons per acre, offering, respectively, $15.50 and $13.50 per gondola. Miller insisted that the company was bargaining regressively. Hipp insisted that the company had to graph the prior proposal, and this graph made a straight line on the chart. He claimed the company had raised the line $0.50. He said that the anomalies between the two proposed pay rates came as a result of changin

the yield increments. While this appears to be true (see Appendix A), it is nevertheless also true that for two yields, 5 and 7 tons per acre, the proposed pay rate effectively diminished $0.50. On September 30th, Hipp reorganized his September 24th proposal so that it followed the same line on the graph, but resulted in a pay raise for every increment, by changing the rates at different increments than the September 24th proposal.

It is worth noting that at the first meeting on April 3rd, the parties agreed that agreement would be reached on an article by article basis, and that until a whole article had been agreed to by both parties, that article could be modified. The article was to be considered to be merely a proposal, no matter how many paragraphs had been agreed to, until the entire article was agreed to.

3. Bargaining Conduct Generally

Throughout the bargaining, the company refused to provide information, provided inaccurate or misleading information, or provided accurate complete information only after a substantial delay, (see discussion on the Provision of Information, above). The company also failed to provide an adequately informed negotiator (see discussion above).

At the April 3rd session, Michael Hogan stated that Hickam or Shirley Hickam would be present at every session. Shirley Hickam was never present at a session. While Hickam attended the first sessions regularly, his attendance through the later sessions was spotty. On July 24th, Hickam was not present; he was showing dogs. On August 8th, Hickam was there only intermittently. On August 13th, Hickam arrived late and left early. On August 22nd, Hickam was not

there at the start because he was transporting dogs; he arrived very late. On August 29th, Hickam was late because he was picking up a list of peach pickers for Debra Miller from his accountant. Part way through the meeting, he asked if he could leave. Miller requested that he not leave, because she would likely have questions that Hipp would not be able to answer. Hickam left anyway. On September llth, Hickam was there for only part of the meeting. On September 12th, Hickam was not in attendance. He was at a dog show. On September 17th, Hickam arrived ten minutes late, having returned to his house for cigarettes. On September 19th, Hickam was late. On September 24th, Hickam was about an hour and one-half late. At the start of that meeting, Hipp had said that Hickam would be there "shortly". On October 9th, Hickam was there at the start, but left part way through. He later returned to the meeting.

The Union was not always punctual either. Union negotiators were fifteen or twenty minutes late on August 1st, 8th, 22nd, and September llth.

Hickam frequently delayed the negotiations by failing to respond to Union proposals until pressed. For example, the company's response to the Union's initial language proposal (GC-41) was a proposal (GC-45) that did not address twelve of the articles that the Union had proposed. These included new or changed job classifications, leaves of absences, supervisors and bargaining unit work, worker's security, bulletin boards, income tax withholding, successorship, family housing, credit union withholding, and locations of company operations. When asked by the company what the status was of these articles, the company merely stated that they were rejected, but that

they were willing to discuss them. The company gave no explanation of why the articles had been rejected. When, under Union pressure, the company finally made counter proposals, those counter proposals were often very similar to those made by the Union to begin with.

Even though the company insisted that it no longer contested the UFW's certification, and even though it apparently acquiesced to the Union's demand, the company repeatedly failed to refer to the ALRB certification number in acknowledging the Union as the exclusive representative of Hickam's employees.

Hickam initially rejected the Union's family housing proposal, giving as the reason that the company did not provide any employee housing. The proposal, in fact, had nothing to do with employee provided housing. The proposal was designed to encourage construction of family housing for farm workers locally. The company continued to reject that article until shortly before the start of this hearing, at which point it proposed an article that the Union was able to agree to.

The company repeatedly made reporting and standby pay proposals that were in violation of Industrial Welfare Commission orders (GC-36). The Union had to object to this several times before the company brought the proposal up to the legal requirements.

The company's initial proposal on rest periods was for shorter rests than it currently gave its workers. The company changed its proposal when the Union objected to this.

The company rejected the Union's bereavement pay proposal and refused to make any counter proposal, saying that it did not apply to Hickam's operations because the seasons were too short, and

that it would be too costly because Mexicans have too many relatives. When the company finally did propose a bereavement pay article, late in the bargaining, it turned out to be very similar to the Union's original proposal, and the Union agreed to it.

Hickam initially rejected the Union's proposal on jury duty and witness pay. The reason given was that Hickam's workers had managed in the past to evade serving as witnesses or jurors. The company refused to make any counter proposal. Late in the bargaining, as this hearing became iminent, the company proposed an article very similar to the Unions.

For a time Hickam appeared to negotiate the Christmas bonuses. However, he eventually refused to do so, stating that he would not bargain about his "Christmas present" to his employees

The Union proposed that the company pay for injuries on the job that were not covered by Workmen's Compensation. The company rejected this saying that Workmen's Compensation covered everything. The Union objected that this was only for injuries not covered by Workmen's Compensation. The company merely repeated its prior response.

The company simply rejected the Union's proposal on Union representatives, and never made any counter proposal. The only reason given was that Hickam's operation was too small.

The company rejected the Union's grievance and arbitration proposal as being either too long or too short. The Union's general arbitration proposal called for a time table potentially as long as one hundred twenty (120) days. The Union felt this time period was necessary for proper investigation, and to weed out non-meritorious

grievances. The Union's expedited arbitration proposal, for serious grievances, was to last seventy (70) days. The company rejected the general grievance procedure because it took too long; it did not allow for preservance of evidence, nor the maintenance of contact with largely transient witnesses. The company rejected the expedited procedure as being too short. The company felt that such a procedure might force a hearing at a critical time of harvest, and thus stop production. Paradoxically, the company proposed a much shorter grievance procedure, lasting no more than fourteen (14) days. The company never explained this anomaly. The company continually raised problems with the Union's grievance proposal, however, as fast as the Union attempted to address those problems, the company raised new problems.

The final proposal was made by the Union on November 22nd. Four and one-half months later there still had been no response by the company.

Hickam persistently refused to discuss his steady employees as members of the bargaining unit. He stated repeatedly that if they were made to join the Union they would quit, and if they quit he would quit.

The company initially proposed $0.10 per hour per worker for a medical plan. However, it later shifted that $O.ID to the wage structure, and refused to consider a medical plan thereafter.

At the beginning of the negotiations, the company stated that any Union proposal that it did not respond to should be deemed rejected. It said that this did not mean it would not discuss the proposals, merely that it had rejected them. In its first counter

proposal, the Union failed to respond to twelve article proposed by the Union. The company followed this course of conduct throughout the negotiations. As a result the Union negotiator spent much time trying to determine what the company's position was, and the reasons for it. When Miller demanded a response in writing to each Union proposal, she received GC-84, which merely listed the Union's proposal and then said "rejected". This conduct delayed and prolonged the negotiations.

The company insisted there was a need for it to sub-contract work because overlaps between crops sometimes caused shortages of equipment. This applied only to specific crops. Upon being questioned by the Union, Hickam admitted that no such overlap had occurred for the past three years. He then suggested that such an overlap might occur in 1980. However, no such overlap did occur.

Hickam stated that there was a problem in giving farm wide seniority, as proposed by the Union. The problem the company said was that it had two crews, one paid on an hourly basis and the other paid on a piece basis. In fact, both Hector's crew and Gloria's crew were paid sometime by piece rate, and sometimes by an hourly rate.

The company refused to consider any proposal on mechanization. It insisted that any problems caused by mechanization were covered by the sub-contracting article. In fact, none of the subcontracting proposals contained any provision for the two biggest concerns caused by mechanization; the displacement of employees by machines, and the resultant decrease in the bargaining unit.

The company rejected the Union's proposal for Union representatives for Hickam's ranch, saying that Hickam's operation was too small. When pressed further, the company simply said the propos-

al was "silly".

In its vacation pay proposal, the company insisted that employees must take their vacation time and their vacation pay simultaneously. Hickam's practice was that the employees could take their vacation whenever they wanted, and receive their vacation pay at the end of the year.

The company's standby and reporting pay proposal failed to comply with the requirements of the Industrial Welfare Commission orders (GC-36). When the Union pointed out hardships that could be caused by the company's proposal, Hipp said "Well, they can quit."

The Union proposed that the Thompson harvest employees be paid by weight. Hickam refused to consider that, saying that it would be too burdensome for him to supply scales on the field. He also said no other ranchers in the area paid by weight. In fact, a large number of growers in Tulare County and surrounding counties do pay their juice grape harvesters by weight.

The Union has alleged that for a long time the company offered less than they were currently paying. None of the evidence supports this. At the time of the first economic proposal, Hickam was paying a general rate of $3.50 per hour. In its first economic proposal, Hickam proposed pay and benefits totalling $3.50 per hour. After that the proposals did increase.

On October 24th, the company claimed that it could not afford to propose any more. It offered to open its books to the Union, provided the Union supplied a competent person to examine them. The company defined a competent person as a CPA or a trust

attorney. The Union's first attempts to examine the books were foiled because the Union examiner was not a CPA or a trust attorney, but rather a Union bookkeeper who had done these kinds of examinations for the Union in the past. A date to examine the books could not be set until early 1981. The evidence that Hickam attempted to introduce at this hearing (RX-D) is based totally upon calculations based upon estimated figures, made from unverified sources. Additionally, it is uncertain how much of Hickam's operation is reflected in these calculations. The testimony of Paul Verissimo, Hickam's account, in support of his calculations, is no more reliable, since it stems from the same factual basis.

Throughout the negotiations Hickam demonstrated a profound lack of respect for and hostility towards the Union. At one point he said the Union was "harassing" him after the Union had requested information. At another point, Hickam said that he was going to sell everything except five acres of dogs because dogs don't argue back". In 4 ALRB No. 48, it was found that Hickam instructed Hector that if he saw organizers "bothering" employees he should ask them to leave. 4 ALRB No. 48 (GC-32) also found that "Hickam was signatory to a labor agreement with the Union from 1970 to 1973. He was dissatisfied with the Union's performance under the agreement and candidly admitted that, if he could he would rather not deal with the Union again." Since the representation election in 1975 and the Union's certification in 1977, Hickam has done all he could to avoid dealing with the Union. This course of conduct during these negotiations seems to be yet another aspect of Hickam's general attitude and course of conduct towards the Union.

Hipp seldom provided Hickam or Huerta with copies of documents he brought to the meetings. Hipp and Hogan delayed

for months in providing the payroll documents to the Union. These attorneys command a large well equipped staff at a large, successful established law firm. Copies could easily and quickly been produced. As a matter of common courtesy (not to mention the requirements of law) copies of the materials being discussed should have been provided by the party in control of those materials.

I would like to add that I have found one can often get a sense of a parties' desire to negotiate in good faith by looking to the "minor" courtesies extended to the other side.

E. Denial of Access

On August 22nd, Debra Miller briefly contacted peach harvest employees at Hickam's ranch. She asked their supervisor, Jesus Olivera, when she could have a longer time to talk to them. They settled on the next day after work. Miller specifically asked when work would be done, and Olivera told her that the work would end at 3 o'clock. Miller arrived at 2:25 p.m. in order to be there early. Olivera had pursuaded the workers to work without lunch in order to get off early, and most of them had already left. As a result, Miller was unable to talk with the peach pickers.

On the morning of October 10th, Miller attempted to talk to grape pickers working under Hector at El Dorado. She had been talking to the workers for a short time when Hector arrived. Hector told Miller, in the presence of the workers, that she could only speak to the workers during the hours set forth in the Boards per-certification access regulation (8 California Administrative Code §20900 et seq.). Miller maintained that the rules governing access during negotiations covered this situation and continued to attempt to talk to the workers. Hector kept insisting that she had no right to be there, and stayed with her as she attempted to talk to the workers. After about fifteen minutes, Hector left and Miller was able to talk to the workers for a short time. Hector had gone to talk to the El Dorado ranch manager, Joe Golonski, and asked if Miller had permission to be there. Golonski said no and Hector went back to the field. He again told Miller, in the presence of the workers, that she had no right to be there, and that he would have her arrested if she insisted on staying.

This threat was not without substance in light of Hector's record of such conduct against Union negotiators and organizers (see 4 ALRB 48). Miller left the field at that point.

Moreover, Hickam's failure to provide accurate employee lists, work schedules, and job locations, greatly hindered the attempts of the Union to contact employees.

F. Discharge of Juan and Marguerita Lopez

At the end of October, Juan and Marguerita Lopez were picking Emperors at El Dorado. They were paid 35 and 40 cents a box. At El Dorado, both Lopez's complained to Hector about the bathroom that had been provided for the crew. There was only one, and it was filthy and had no toilet paper. This was for a crew of sixty people. The Lopez' complained at least twice, but said Hector hardly paid any attention.

On November 2nd, at Hickam's field, there were not enough swampers. Juan and Marguerita Lopez were not there, but Marguerita's father was. Since there were not enough swampers, the pickers were told to carry their boxes out to the road so the trucks could pick them up. Mr. Cortinas (Marguerita's father) told Hector that was not picker's work.

On November 3rd, Hickam was proposing to pay the workers 30 cents a box. The workers refused to work for this, and demanded 35 cents a box. Several people spoke to Hector about this, including Juan and Marguerita Lopez. Hector went and found Hickam and got permission to pay 35 cents a box. Lopez' and the other workers began to work.

On November 4th, at the same field, the Lopez's were picking in the same row but in different boxes. It seems unlikely they could have been picking into the same box, as testified to by Hector and Juan Marquez (one of Hector's foremen), because of the physical problems involved in doing so. According to the testimony, the most that Marguerita Lopez could have been warned about the quality of her work was once. This was not unusual. Juan Marquez testified that he had to speak to some employees every day. The testimony as to how many times Juan Lopez was warned is extremely contradictory. Juan Marquez and Jesus Olivera each testified that each of them had warned them three times. Juan Lopez testified that he was only warned once before he was fired. I find that Juan Lopez must have been warned at least twice before he was fired.

Although the Lopez' were fired about noon they continued to work until about 2 o'clock; they insisted on finishing out their row. When Hector came to the field Juan Lopez complained to Hector and Hector sustained the actions of his foreman. Hector went to Hickam's office and had the Lopez' checks made out. The Lopez' never complained to Hickam about the discharge, even though they had worked seasonly for Hickam for many years, and had complained to him in the past when they felt they were wronged. Juan stated that he felt that Hickam must have okayed the discharge since the checks were made out so quickly.

Marguerita Lopez appears to have been fired merely because she was with Juan. She was apparently warned no more than once, yet she was fired at the same time he was. The foreman testified that it was normal to have to warn employees once a day.

VI. Bad Faith Law

1. Generally

Section 1153(e) of the Labor Code requires an agricultural employer to bargain in good faith with the certified bargaining representative of the workers. To refuse to do so is a violation of both Sections 1153(a) and (e).

The duty to bargain in good faith means more than just to meet; it requires "negotiation with a bona fide intent to reach an agreement if agreement is possible". Atlas Mills, Inc. 3 NLRB 10, 21 (1937). The parties must "participate actively in the deliberations so as to indicate a present intention to find a basis for agreement and a sincere effort must be made to reach a common ground". NLRB vs. Montgomery Wards, 133 F.2d 676, 686, 12 LRRM 508 (9th c. 1943). Mere talk is not enough. As the 5th circuit observed in NLRB v. Herman Sausage Co., 275, F.2d 229, 232, 45 LRRM 2829 (5th c. 1960):

> "Bad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail. Hence, we have said in more colorful language it takes more than 'mere surface bargaining', or 'shadow boxing to draw', or giving the Union a runa-round while purporting to be meeting with the Union for the purposes of collective bargaining." (footnotes omitted)

"Parties are obligated to apply as great a degree of diligence and promptness in arranging and conducting their collective bargaining negotiations as they display in other business affairs of importance". A. H. Belo, Corp. (WFAA TV), 1970 NLRB 1558, 1565 (1968), modified 411 F.2d 959 (5th c. 1969), J. H. Rutter Rex Mfg. Co., Inc., 86 NLRB 470, 806 (1949).

In making this determination of good faith, an admission of intent can rarely be found. The fact finder must rely on logical inference from the evidence showing intent from the totality of Respondent's conduct. Continental Ins. Co. v. NLRB, 495 F.2d 44, 48, (2d. c.1974). NLRB v. Reed & Prince Mfg. 205 F.2nd 131 (1st c.) cert denied 346 U.S. 887 (1953), P.P. Murphy Produce Co. 5 ALRB Ho.6 (1979). With these general principles in mind, I now turn to the specific allegations or bad faith bargaining made against the respondent.

2. Unilateral Wage Changes

Some types of conduct, by themselves, constitute per se violations of the duty to bargain, and are also strong evidence of bad faith. Morris, The developing labor law, P.322-23. Unilateral changes in working conditions are such per se violations. NLRB v. Katz 369 U.S. 736 (1962). Unilateral wage changes have been called "by far the most important 'unilateral act'", NLRB v. Fitzgerald Mills Corp, 313 F.2d, 260, 267-68 (2d. c.), cert denied 375 U.S.834 (1963); NLRB v. Katz, supra; and a per se violation. The rationale for this is that by such conduct, the employer greatly undermines the Union's status in the eyes of the workers by making it appear that the employer, and not the Union is the true giver and guardian of benefits to the workers. NLRB v. Exchange Parts, 375 U.S.405 (1964); Hemet Wholesale 4 ALRB No. 75 (1978).

A "unilateral" wage change is defined as a unilateral alteration of existing conditions by the employer without notifying and bargaining in good faith with the Union over the alteration. NLRB v. Katz, supra. Any alteration made without first giving the Union notice

of the change and an opportunity to bargain over it is presumptively a bad faith unilateral change. The employer then must bear the burden of demonstrating that its conduct was in good faith, and warranted by the circumstance. This is a heavy burden and one that is rarely met. Id, German, Basic Text on Labor Law, West Publishing Co. (1976).

There appear to be four ways to justify a unilateral increase: by showing the change was consistent with established past practice; by showing the existence of a bona fide bargaining impasse; by showing a bona fide business necessity; and by showing the Union waived its right to bargain over the change. German, supra, Page 444.

Changes in pay that are consistent in past practice are considered to be continuations of the status quo and not changes in working conditions. NLRB v. Ralph Printing & Lithographing, 433 F.2d 1058 (8th c. 1970); cert denied 401 U.S.925. However, the policy must allow for no discretion by the employer. It must be automatic; if there is any discretion with respect to the change, it is not "established* and is not justifiable as past practice. NLRB v. Katz, supra; O.P. Murphy Co. 5 ALRB No. 63 (1979).

The existence of an impasse in the bargaining, if it is bona fide will serve to justify a unilateral pay change. An impasse is reached when the parties are unable to reach agreement despite their best good faith efforts to do so. Taft Broadcasting Co., 163 ALRB 475 (1967). Whether a bona fide impasse exists depends on the totality of the circumstances. Television & Radio Artists v. NLRB (Taft Broadcasting Co.) 395 F.2d 622 (D.C. c. 1968). Factors to consider in making this determination include: (1) The length of time between the start

of negotiations and the declaration of impasse; a short time tends to indicate that exhaustive bargaining has not taken place (Id); (2) whether there has been agreement and/or movement before the impasse was declared; movement and agreement indicate capacity for more (Id); (3) where the parties have shown room for movement in major areas of the bargaining, even though some others are deadlocked, impasse is unlikely (Montebello Rose Co., Inc. 5 ALRB 64 [1979]; Ray's Liquor Store, 224 NLRB No. 26 [1976]); (4) whether there has been exhaustive good faith negotiations, and no reason for either party to believe that further negotiations would be fruitful (Dust-Tex Service, Inc. 214 NLRB 399 [1974]; Hi-Way Billboards, Inc., 206 NLRB 22 [1973]); (5) whether there is any change in circumstances that suggests that negotiations can now be fruitful — e.g., if one party retreats from previous demands (Sharon Hats, Inc., 127 NLRB 947 [I960], enforced 289 F.2d 628 [5th c. 1961]). Even after an impasse is reached, an employer may not go beyond his previous offers, or do more than comply with a change of law (e.g., even wage law). B;-Rite Foods, Inc., 147 NLRB 59 (1964).

Although the defense of business necessity is still available against a charge of unilateral change, very few cases have allowed it. Most of these seem to permit this justification to work only after impasse has been reached. German, supra, Pg. 444-45.

A Union may waive its right to require bargaining by the employer, but the doctrine is construed very strictly because of the important right that is lost. Thus waiver must be clear and unequivical, and even then applies only very specifically. Morris, supra, Pg. 333;

German, supra, Pg. 466-80. Waiver cannot be established by mere silence on the part of the Union. CaravelleBoat Co., 227 NLRB 1355 (1977). In order to establish waiver, the employee must show that the Union was given clear notice of the change far enough in advance of actual implementation to afford the Union a chance to counter-propose and negotiate. Garment Workers v. NLRB (McLaughlin Mfg. Co.) 463 F.2d 907 (D.C. c. 1972); Ralph Printing & Lithographing Co. 433 F.2d 1058 (8th c. 1970); Hemet Wholesale 4 ALRB No. 75 (1978).

3. Alleged Failure to Supply Information

Part of the duty to bargain in good faith is, for the employer, the duty to provide information to the Union so that the issues can be fully, honestly and intelligently discussed. S. L. Alien & Co., Inc., 1 ALRB 741 (1936); NLRB v.Truitt Mfg. Co., 351 U.S. 149 (1956). The other prerequisite is that the requested information be relevant and reasonably necessary to the bargaining. J. F. Case Co. v. NLRB 253 F.2d 149 (7th c. 1958); AS-H-NE Farms Co., 6 ALRB No. 9 (1980).

Some information is presumptively relevant. This is information regarding mandatory subjects of bargaining; it must be provided if requested. Curtis-Wright Aero, Div. v. NLRB 347 F.2d 61 (3rd c. 1965). Refusal to do so is an unfair labor practice. Id. Presumptively relevant information includes employees' names, addresses, dates of hire, job classifications, and updates thereto, AS-H-NE Farms, Inc., supra; Hotel Enterprises, 224 NLRB No. 103 (1976); Autoprod, Inc., 223 NLRB 773 (1976); Sumner Home, 226 NLRB 976 (1976), modified 559 F.2d 599 F.2d 762 (6th Cir. 1979); Prudential Insurance Co. v. NLRB (2nd Cir. 1969) 412 F.2d 77, cert, denied 396 U.S. 928 (1969); Gladwin Industrial. Inc., 183 NLRB 280 (1970), economic production data, including output, wages, numbers of hours worked, and subcontracting information, Garrett Railroad Car and Equipment, Inc., 244 NLRB 132 (1979); Solar Turbines International, 244 NLRB 37 (1979); AS-H-NE Farms, Inc., supra; German, Labor Law, West Publishing Co., p. 411 (1976), fringe benefits, including health and welfare plans, pension plans, profit sharing plans, and life insurance plans, or the lack of any benefits, Masaji Etc (dba Etc Farms)[6 ALRB No. 20 (1980);] Levington Shipbuilding Co., 244 NLRB 18 (1979); Connecti-

cut Light & Power Co., v. NLRB, 476 F.2d 1079 (2nd Cir. 1973); Cowles Communication, Inc., 172 NLRB 1909 (1968); Pennco, Inc., 212 NLRB 677 (1974).

Other information is not presumptively relevant. In order to have a right to such information, the Union need only explain its relevance. NLRB v. Acme Industrial Co., 385 U.S. 432, Fn*6 (1967). The courts have defined relevance very liberally; only probable or potential relevance need be shown. Id.

Once relevant information has been requested, any unbiased delay in providing it or failure to provide it is a per se violation of the duty to bargain in good faith; relevant information must be supplied promptly. Masaji Eta (dba Etc Farms), supra; AS-H-NE Farms, Inc., supra; Aero Motive Mfg. Co., 195 NLRB 790 (1972) enf'd; 475 F.2nd (9th Cir. 1973); Ellsworth Sheet Metal, Inc., 232 NLRB No. 109 (1977); Colonial Press, Inc., 204 NLRB 852; B. F. Diamond Construction Co., 163 NLRB 161 (1967); DePalmas Printing Co., 204 NLRB 12. Whether or not a delay is unreasonable depends on the facts of each case; the usual standard is whether the employer exercised the same diligence it would apply to its ordinary business dealings. (J. H. Rutter Rex Mfg. Co., 86 ALRB 470, 506 (1949); Colonial Press, Inc., 204 NLRB 852 (date); Reed & Prince Mfg. Co., 96 NLRB 850 (1953), enf'd, NLRB v. Reed & Prince Mfg. Co., 205, F.2nd. 131 (1st c. 1953), cert, denied, 346 U.S. 887 (1953). A delay of three months is too long, even when the information is incomplete, and the people necessary to compile it are absent from work. Peyton Packing Co., 129 NLRB 1358 (1961). Fifteen (15) days, however, is not unreasonable. Partee, 107 NLRB 1177 (1954). The information

need not be supplied in the form requested by the Union; oral provision of information is adequate to meet the duty. Cincinnati Steel Casting Co., 86 NLRB 592.

The Union need not request the information more than once to have established its right to the information and the employees' duty to supply it. Masaji, Etc., 6 ALRB No. 20 (1980); AS-H-NE Farms, Inc., 6 ALRB No. 49 (1980). The fact that the Union is able to negotiate, and does negotiate without the requested information does not effect that informations relevancy. NLRB v. Fitzgerald Mills Corp., 313 F.2nd. 260 (2d c. 1963), cert denied, 375 U.S. 834 (1963); AS-H-NE Farms, Inc., supra.

Defenses against the duty to provide information are, limited. Morris,supra pg. 320-21. The most common is waiver; the waiver must be by "clear and unmistakeable" language. Id.

4. Informed Negotiator

The employer has a duty to supply an informal and knowledgable negotiator. If an employer appoints a negotiator whose deficiences frustrate or delay the bargaining, the employer may be found in bad faith. Woody Pontiac Sales, Inc., 174 NLRB 512 (1969) Coronet Casuals, Inc., 207 NLRB 304 (1973). The employer must make sure this negotiator is kept sufficiently supplied with adequate information about the employer's operations and positions so that fruitful negotiations can result. If the negotiator cannot be kept adequately informed, the company must provide someone who is at all bargaining sessions. 0. P. Murphy Produce, Inc., 5 ALRB No. 63 (1979); NLRB v. Alterman Transport Lines, Inc., 587 F.2d. 212 (5th c. 1979).

5. Hickam's Bargaining Table Conduct

The duty to bargain in good faith requires both parties to "participate actively in the deliberations so as to indicate a present intention to find a basis for agreement, and a sincere effort must be made to reach a common ground". NLRB v. Montgomery Ward, 133 F.2d. 676 (9th c. 1943). This requires more than just meeting. Conduct that unreasonably delays the bargaining process is evidence of bad faith. O. P. Murphy Produce Co., Inc., 5 ALRB No. 63 (1979). An employer must show at least that degree of diligence as it would in the pursuit of its own business affairs. J. H. Rutter Rex Co., Inc., 86 NLRB 470, 506 (1949).

Unreasonable delay in making timely or adequate proposals or counter-proposals has been held to be bad faith. 0. P. Murphy Produce Co., supra; Montebella Rose, 5 ALRB No. 64 (1979). The same is true of a delay in discussing substantive issues. Id.

Refusal to discuss mandatory subjects of bargaining is in direct violation of Labor Code Section 1152 (NLRA Section 8(c)). The parties are required to bargain over mandatory subjects of bargaining. Id; NLRB v. Wooster Div. of Bary Warner Corp., 356 U.S. 342 (1958). Mandatory subjects include "wages, hours, and other terms and conditions of employment". Id. "Wages" has been held to include any tangible benefit given by the employer to the employee as a direct result of the employee's holding that job, including wages, benefits, bonuses, payment of any kind, housing and operations done in connection with the payment (e.g., income tax withholding). Beacon Piece Dyeing & Finishing Co., 121 NLRB 953 (1958); Morris, The Developing Labor Law, The Bureau of

National Affairs, Inc., 1971, p. 390-92; Braswell Motor Freight Lines, Inc., 141 NLRB 1154 (1963); Singer Mfg. Co., 24 NLRB 444 (1940),enf'd, 119 F.2d 131 (7th Cir. 1941); Inland Steel Co., 77 NLRB 1, enf'd, 170 F.2d 247 (7th Cir. 1948); W. W. Cross & Co., 174 F.2d 875 (1st Cir. 1949); Elgin Standard Brick Mfg. Co., 90 NLRB 1467 (1950); NLRB v. Lehigh Portland Cement Co., 205 F.2d 821 (4th Cir. 1953); Orange County Machine Works, 147 NLRB No. 132 (1964). "Hours" has been held to include all all those company farming assignments by the employer, and all those concerning benefits provided to the employees. Id. Amalgamated Meatcutters v. Jewel Tea Co., 381 U.S.676, 691 (1965); Braswell Motor Freight Lines, Inc., 141 NLRB 1154 (1963); National Grinding Wheel Co., Inc., 75 NLRB No. 112 (1948); NLRB v. Katz, 369 U.S.736 (1962). "Other terms and con-conditions of employment" includes grievance and arbitration procedures
(Bethlenhem Steel Co., 136 NLRB 1500 (1962),enforcement denied on other grounds, 230 F.2d 615 (3rd Cir. 1963); NLRB v. Boss Mfg. Co., 118 F.2d 187 (7th Cir. 1941)); Seniority(Morris, The Developing Labor Law, The Bureau of National Affairs, 1971, P.406; Sub-contracting (Fibreboard Paper Products Corp. v. NLRB, 379 U.S.203 (1964); Westinghouse Electric Corp., 150 NLRB 1574 (1964)); Mechanization (see Rochet (dba The Renton News Record), 136 NLRB 1292 (1974)); Union Representatives (see Fiber-board Paper Products Corp. v. NLRB, supra) (see United States v. Motzell (D.N.J. 1961), 199 Fed. Supp. 192; Employees' Independent Union v. Wyman Gordon Company, (N.D. Ill, 1970); 314 Fed. Supp. 346)); Workers' Security (Alien Bradley Co. v. NLRB (7th Cir. 1961) 286 F.2d 442); Bulletin Boards (NLRB v. Southern Transportation, Inc., 343 F.2d 558 (8th Cir. 1965)); Supervisors and Bargaining Unit Work (Crown Coach Corp, 155 NLRB 625 (1965)); New or Changed Job Classifications (Inter-National Harvester

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Co., 227 NLRB NO./1976)); Successorship (Ozark Trailers, Inc., 161 NLRB 561

(1966)); Credit Union Withholding (National Broadcasting Co., 241 NLRB No. 147 (1979); G.T.E., 240 NLRB No. 30 (1979)); Locations of Company Operations (Carroll v. Musicians (2nd Cir. 1967) 372 F.2d 155).

The requirement to "participate actively---so as to indicate a present intent to find a basis for agreement" mandates that the parties fully explore the issues with an eye towards finding some basis to agree. While this does not prohibit adamant positions in itself, the Board may consider adamance evidence of bad faith when combined with other bargaining table conduct. German, supra, p. 484; however, a party is not required to make concessions. Section 1155.2(c).

The failure of a party to give substantial reasons for its positions may indicate bad faith. Patently improbable explanations or unrefutable justifications (e.g., company policy) make full exploration of the problem difficult, and does not reflect a genuine desire to compromise differences. Alba-Waldensman, 167 NLRB 695 (1967) enforced 404 F.2d 1370 (4th c. 1968); Steel Workers v. NLRB (H. K. Porter Co.) 363 F.2d 272 (D.C. c. 1966), cert denied, 385 U. S.851 (1966).

A proposal not agreed upon by the parties may be withdrawn at any time. However, once there is even tentative agreement, withdrawal without showing good cause is evidence of bad faith. NLRB v. Alterman Transport, Inc., 287 F.2d 212 (5th c. 1979); American Seating Co. v. NLRB, 424 F.2d 106, 108 (5th c. 1970).

6. Access/Surveillance

An employer can bargain in bad faith by virtue of his conduct away from the bargaining sessions. Safeway Trails, 216 NLRB 951 (1977). Interference with reasonable access of Union representatives

to the workers during the bargaining process has been held to be evidence of bad faith. O. P. Murphy Produce Co., supra. During the post certification bargaining process the Union is not limited to the access rules which governs pre certification access, but is instead allowed access at reasonable times and places as necessary to fulfill its bargaining duties. Id. Furthermore, the failure to supply information about workers' whereabouts and schedules is evidence of bad faith in the bargaining process. AS-H-NE Farms, supra.

Surveillance by company agents of Union representatives in the course of contracting bargaining unit workers is a violation of Section 1153(a). Tomooka Bros., 2 ALRB No. 52 (1976). "Surveillance" occurs whenever the company agent deliberately intrudes on communications between the Union representative and the workers, even if the company agent is normally present at that time and place. Scenic Sports wear, 196 NLRB No. 72 (1972). Even just giving the impression of surveillance is a violation of the code; the conduct need only have a reasonable tendency (emphasis added) to restrain the workers in the exercise of their Section 1152 rights. Perry's Plants, 5 ALRB No. 17 (1979); Merzoian Bros., 3 ALRB No. 62 (1977). Proof of actual interference in Section 1152 rights is unnecessary. Id.

2. Discharge

An employer may not discharge an employee because of conduct by the employee that is protected by Section 1152. California Labor Code 1153(c). In order to prove a discharge is discriminatory, it must be shown that : (1) the employee engaged in protected activity; (2) that the employer knew of the protected conduct; (3) that the employer knew the conduct was protected; and (4) that the employee was

discharged because, at least in part, of that conduct. NLRB v. Burnup & Sims, 379 U.S. 21 (1964). General Counsel has the burden of establishing these elements. M. G. Zaninovich, Inc., 4 ALRB No. 70 (1978); Lu-ette Farms, Inc., 3 ALRB No. 38 (1977).

The anti-union animus must be the decisive factor in the discharge, the straw that broke the camel's back; if the employer would not have discharged the employee but for protected activity. The anti-union animus is sufficient to cause the discharge to be a violation of Section 1153(c). Gorman, supra, p. 138. Once General Counsel has made a prima facie case for a discriminating discharge, the burden shifts to the employer to show the discharge was for cause.

The independent conduct of one individual can be concerted activity if the object of the action concerns other employees as well. Alleuia Cushion Co., 221 NLRB 999 (1975); Mirando Mushroom Farms, Inc., 6 ALRB No. 22 (1980); Foster Poultry Farms, 6 ALRB No. 15 (1980).

The discharge action must be viewed in the context of the employers past toleration for the cause offered as justification for the discharge and the employers disciplinary conduct towards employees generally. Gulf Wands Corp., 233 NLRB No. 116 (1977). The timing of the discharges is similarly significant. Id., NLRB v. Montgomery ward, supra.

VII. Conclusions Of Law

A. Unilateral Wage Change Analysis

Hickam is alleged to have made six unjustified unilateral wage changes: (1 & 2) In early May, Hickam raised the pay of each of his five steady employees 25 cents per hour. In mid June, he raised the pay of his general labor workers from $3.35 to $3.50 per hour. He did not inform his bargaining representatives, Hogan and Hipp, nor did he inform the UFW. Active negotiating had been taking place since April 3.

The UFW found out about the change only through Hickam's employees. When Emilio Huerta, the Union Representative, confronted Hickam about the raises on July 14, Hickam admitted having done them and admitted he had not told anyone, neither the Union, nor the employees, nor his own representatives.[7] On July 15, Huerta filed 80-CE-105-D.

Hipp conceded at the following session, on July 24, that these raises were unilateral changes, and that they were an unfair

[7]Both Huerta and Deborah Miller testified that Hipp said "a lot of jaws dropped" when Hickam revealed the raises. Although Hipp denied making this statement, I find that it would be an apt description of the natural reaction to the sudden receipt of such information, and that it was made.

labor practice and asked what the Union wanted in order to settle it. The UFW had not responded to this inquiry, nor to subsequent similar inquiries, except for Huerta's statement, at one point, that he wanted a contract.

Hickam's claim that the raises were in keeping with past practice is belated, and not consistent with legal doctrine anyway. The law requires that a raise be firmly established and not subject to any discretion by the employer. The evidence is uniform that Hickam had complete discretion with respect to the granting, and amounts of these raises. Hickam simply granted raises in the amounts necessary, and at the time necessary to keep his wages competitive with other ranches in the area.

Since the UFW was informed of the raises only after they were implemented, the Union had no chance to negotiate about them, nor to waive its rights to negotiate about them. This period of the negotiations was the most productive in forms of agreements reached. Mogt of the articles agreed to were agreed to in the June to August period. Clearly no impasse could have existed. This raise is the very epitome of an unjustified unilateral wage change.

3. At the July 4th meeting, after confronting the company about the raises complained of in 80-CE-105-D, Huerta carefully explained to Hickam the need to negotiate any proposed change with the Union, and explained the consequences of failing to do so. He also explained that Hickam should inform his own legal advisers and negotiators before he did such a thing. Hickam said "Okay".

By the end of September, the parties had been negotiating wage rates for the Thompson harvest for several meetings. Although they had not agreed on a date, the parties were still actively exploring

possible solutions. On September 26, Hipp phoned Miller to say the Thompson harvest was imminent, and that the company "wanted" to pay its last proposed rate. Miller said that that rate was not acceptable, and that the UFW would consider its implementation bad faith. That same day, Hipp wrote to Miller, declaring that an impasse seemed to exist. On September 30th, Hipp again wrote Miller raising the company's last proposed rate by 50 cents per gondola for some yields. (GC-88). The harvest started the next day, on October 1st. On September 29th and 30th, Hipp had tried to phone Miller, but she was out of town and could not be reached. On October 2nd, Miller phoned Hipp. Hipp informed her that the Thompson harvest had started on October 1st, and that the company was paying its last proposed rate. (the one in GC-88). He had sent Miller a letter to this effect on October 1st; Miller received it on October 3rd.

Any alteration made without first giving the Union notice of the change, and an opportunity to bargain over it is presumptively a bad faith unilateral change. The final company proposal (the one which was implemented) was mailed on September 30th. The next day the harvest started and the company implemented it. This hardly gave the Union either adequate notice or an opportunity to bargain over the proposal. Thus, this is presumptively a bad faith unilateral change, and the burden is on the company to justify its act.

The company has done nothing, either in its brief, or in its testimony to justify the presumed unilateral raise, nor is there a defense that could be validly raised. The proposals were developed in the bargaining sessions; they were not associated with any company

past practice. No impasse existed in light of the movement and concessions being made right up to the day before the harvest started and in light of the fact that the company made a concession after Hipp declared that an impasse existed. The Union had not waived its right to bargain; it had in fact insisted on it. Not a speck of evidence of any business necessity was introduced. The company's allegation that its proposal was for more than the Union proposal is inadequate as a defense in light of the fact that the systems of payment proposed were different (the company proposed a per bin rate, the Union a per ton rate), and in fact, at this point, the company had steadfastly insisted that records necessary to convert bin quantities into tonnages did not exist. Thus, at the time the Union was called upon to evaluate the company's proposal, no way existed of doing so.

The October 1st raise is, therefore, another unilateral wage change in violation of the duty to bargain in good faith.

4. On October 15th, Hipp phoned the Delano Union office for Miller. Miller was at home, sick, so Hipp instead talked to Ken Schroeder. Hipp stated that Hickam was going to strip Malaga's, and that the company "wanted" to pay $25.00 per gondola. Schroeder took the message. The Malaga's were stripped on October 16, the next day; the company paid $25.00 per gondola. Also on October 16th, Hipp again tried (unsuccessfully) to phone Miller, and mailed a letter which Miller received on the 17th confirming that the company had stripped Malaga's on October 16th and paid $25.00 per bin. Malaga stripping had never been discussed before this. The previous year, Hickam had paid $11.00 and $12.00 per bin. The $25.00 rate was in excess of any per bin rate the company had yet proposed.

Any alteration made without first giving the Union notice of the change and an opportunity to bargain over it is presumptively a bad faith unilateral change. The company's "proposal" was made to someone other than the authorized Union negotiator only the day before it was implemented. Hipp never reached the proper Union representative until after this stripping had been done at the company's proposed rate; indeed, that Union representative never even was informed before this that the Malaga's were to be stripped at all. This certainly did not give the Union sufficient notice or opportunity to bargain over the Malaga stripping rate. By the time Miller was able to contact Hipp about it, the Malaga stripping was already over.

Again, the company has offered no justification of this conduct, except for the totally unsupported allegations that the company's conduct did not constitute a raise, but a past practice defense is implied. That defense will not operate here. Hickam paid more in 1980 than in 1979. This rate was totally within his discretion and is thus outside the past practice defense. No other defense is offered, nor would any suffice.

Thus, the October 16th $25.00 per gondola rate for the Malaga stripping constitutes a unilateral wage change in violation of the duty to bargain in good faith.

5. On October 16th, Hipp again phoned the Union's Delano office for Miller. She was still out sick. Hipp talked to Ken Schroeder, explaining that the company was having a hard time getting swampers for the Emperor harvest for less than $4.00 per hour, and

that the company wanted to pay swampers $4.00. The company's last proposed rate for swampers had been $3.90 (GC-94). In 1979, Hickam had paid swampers a maximum of $3.75 per hour. Schroeder took the message. Hipp then wrote Miller a letter containing the same information, and also stating that the Emperor harvest would start the next morning, October 17th (GC-99). On October 17th, Miller phoned Hipp, and protested the company's conduct, and reproposed the last rates proposed by the Union. Miller received Hipp's October 16th letter (GC-99) on October 18th, after the Emperor harvest had started. The company paid swampers $4.00 per hour.

Any alteration without first giving the Union notice of the change and an opportunity to bargain over is presumptively a bad faith unilateral change. The company proposal here was not received by the proper Union representative until late on October 16th. The proposal was to be implemented, and was implemented, the following morning. By the time the Union was able to contact the company representative simply to reject the company proposal, that proposal had already been implemented; it was never retracted, nor was such an offer made.

The Union clearly had neither timely notice nor any opportunity to bargain over the swamper rates. The company has offered no substantial defense of its conduct with respect to the swamper increase. In its brief Respondent failed to even mention this incident.

The only defense that appears possible on the facts is that of business necessity. However, this is rarely allowed, and even when it is, it is usually allowed only after impasse. Here, there could be no impasse, since there was no bargaining at all over the

$4.00 rate. Moreover, there is no evidence introduced, boyond Hickam's own unsupported and brief testimony, that would support a claim that Hickam had to pay $4.00 to get swampers.

6. On October 30th, Hipp phoned Miller to say that the Emperor harvest would run a couple of more days, and the company wanted to pay 30 cents per box for the first pick, 35 cents per box for the second pick. Since the start of the harvest on October 17th, Hickam had been paying $3.50 per hour. Miller said she would get back to Hipp about it. Later that day in talking to workers on Hickam's payroll (at El Dorado), she found that Emperor harvesters were already getting 35 cents a box for the first pick. These employees later got 40 cents a box for the second box, on October 30 and 31st, and November 2nd. On October 31st, Miller phoned Hipp and protested that employees were already getting more than his proposal of the day before. She suggested that the company must not be serious about getting a contract. On November 3rd, Hickam had begun paying employees on his own property 35 cents per box. Hipp had tried to phone Miller on November 3rd, but Miller was not in. Hipp left a message proposing 35 cents per box for the first pick, and saying that the company wanted to pay that when the Emperor harvest at Hickam's leased property began on November 3rd (the same day), and that Miller should call if that was a problem. On November 4th, Hipp, in a letter, again proposed 35 cents per box. In 1979, Hipp had paid $3.35 per hour, or 30 cents a box.

The Union clearly was not given sufficient notice or an opportunity to bargain over the implementation of these rates. In fact, the Union was notified of them only after they had been implemented.

In its brief, Respondent does not mention these incidents specifically, but mearly says that Hickam had no employees working for him doing that kind of work at that time; Respondent says that these employees are El Dorado employees and not subject to the bargaining. I have already determined that table grape harvest employees at El Dorado are Hickam's agricultural employees. I am at a complete loss as to how Respondent denies the employees at the vineyard (Hickam's leased property) are his. Clearly they must be Hickam's employees. The fact that Hipp requested that Miller call him if the implementation of these proposed rates would be a problem does not affect this finding. The Union's silence cannot be construed to be a waiver on the part of the Union of its right to bargain. Any waivers must be clear and specific.

Respondent offers no other defense, nor does any other applicable legal defense exist. Respondent's conduct here is a unilateral wage change, and a violation of the duty to bargain in good faith.

B. Failure to Provide Information

1. Payroll Information

It is clear that the creation of the payroll summaries was unnecessary. This information already existed in the chronological pay ledgers and the individual compensation sheets. The delay created by the manufacturing of summaries was thus equally unnecessary. The manufacturing of the summaries unnecessarily delayed the production of the raw payroll records, and that appears to be their only purpose. The delay in the provision of the raw payroll data is, therefore, a violation of the duty to provide information, and thus, a violation of the duty to bargain in good faith.

These negotiations took approxiamtely seven and one-half months before they were broken off. It is clear that the individual compensation sheets and chronological pay ledgers existed form the beginning. It is evident they contained relevant information in a form more clear than that provided to the Union by the company. The Union was not told of the existence of these records. When the Union learned of their existence and asked for them, the company refused outright to provide them. It is impossible to believe that the company would have acted in this manner in its usual business dealings. The failure to provide this information is, therefore, a per se violation of the duty to bargain in good faith.

Although information on past employees may have been beyond the company's reach, the company clearly had it within its power to acquire and provide to the Union the names, social security numbers, and street addresses of all employees from the time that information was first requested on March 3, 1980. The fact that the company did not do

do so can only be ascribed as either extreme neglect or actual intent on its part. Such conduct is a violation of the duty to bargain in good faith.

The employee lists that were provided were often incomplete, inaccurate, or ambiguous with respect to names, addresses, job classifications, and even the operation being done. The provision of inaccurate and/or misleading information is a violation of the duty to bargain in good faith.

The operation of several hundred acres of agricultural land requires a certain minimum amount of organization. Mrs. Hickam's precise bookkeeping and payroll operation in relation to a complex process is evidence of this. Certainly the manager must know what jobs are in process, and which jobs are due to be performed next. Yet when the Union asked for job locations in order to contact employees, they were rarely able to get accurate information. This can only be ascribed to the company's recalcitrant attitude, and is a violation of the duty to bargain in good faith.

2. Production Information

The Union was not able to get a clear and accurate picture of Hickam's acreages, and crops until months after that information was requested on March 3rd. The initial information provided by the company was both incomplete and inaccurate. The company surely had this information immediately available. The failure of the company to provide this obviously relevant information upon request is a per se violation of the duty to bargain in good faith.

The company initially claimed that it did not keep records that would allow the conversion of its piece rates into hourly

rates. This is true. However, the company failed to keep such records for the 1980 harvest, when the Union specifically requested they do so. The keeping of such records would not have inconvenienced the company. The failure of the company to accummulate and provide such relevant information to the Union is a violation of the duty to bargain in good faith.

Hickam said, at times, that the Emperor harvest lasted a couple of days, and at other times it would last four to six weeks. While the length of the harvest probably does vary, it cannot vary by that much. Certainly, a consistent and accurate figure could have been given. Failure to do so is a violation of the duty to bargain in good faith.

The company repeatedly insisted that accurate per block yields for the Thompsons was impossible, and insisted on giving estimates. Not until October were documents produced (the truck tickets) which revealed that per block yields were easily calculable. The Union had to ask for two summaries of those documents; the first one provided lacked dates and was thus unusable. The truck tickets existed from the beginning of the negotiations, and could have been provided to the Union or used by Hickam to accurately calculate the Thompson yield. Failure to do so is a violation of the duty to bargain in good faith.

3. Information with Regard to Custom Harvest Operations and Sub Contracting

During the second bargaining meeting, on April 28th, Hogan explained to Huerta that the reason for the delay in providing the

payroll records was that they contained records of Hickam's employees doing work on the property of others, and that this was not bargaining unit work. From this point on Huerta demanded information on all employees on Hickam's payroll, and asserted the Union's position that the UFW represented all employees on Hickam's payroll. Except for the information that was included in the raw payroll data that was provided, the company steadfastly refused to provide any information with regard to operations on property other than Hickams. Although it was not clear at this time that Hickam was a custom harvester, even the failure to provide potentially relevant information is a violation of the duty to bargain in good faith once that potential relevance has been explained. It was explained here, and the refusal to provide that information constitutes a violation of the duty to bargain in good faith. The same is true of the refusal of the company to give any information whatsoever with regard to Hickam's partnerships when the Union finally learned to their existence in late August.

4. Other Alleged Bad Faith Conduct

Spencer Hipp was almost totally unable to answer questions about Hickam's operations; he simply was not adequately informed. This became significant in the latter half of the negotiations when Hickam was frequently absent. The company never provided an informed substitute for Hickam. The failure to provide an informed representative is a violation of the duty to bargain in good faith. The company's conduct here is clearly such a violation.

5. The Company's Bargaining Conduct Generally

It has been alleged that the company bargained regressively with respect to Thompson wage rates. In fact, the company did

propose fifty ($0.50) cents less for two Thompson yield increments than his prior proposal.

Robert Hickam's personal conduct reflects hostility towards the Union and a lack of intent to cooperate with the Union. Hickam passed off inaccuracies in the information provided as clerical errors. Hickam failed to provide timely or accurate information as to the location of workers. At one point, Hickam stated that "only Gus and Anna ... and some deadbeats" wanted the Union. Hickam was often absent from meetings; often the reason for this was so that he could be at dog shows, or to show dogs to potential buyers. Another time, Hickam called a Union proposal ridiculous, said that it would take a month to respond, and that he couldn't meet past 5 o'clock anymore because "he had dogs to feed". Hickam once asked Debra Miller if he could leave a meeting. Miller stated that she did not want him to leave, so that she would have someone there who could answer questions. Hickam left anyway. Hickam refused to bargain about his "Christmas presents" to his employees. At one point, Hickam said the Union was harassing him and said that he was going to sell everything except "5 acres of dogs because dogs did not argue back". In 4 ALRB No. 48 (GC-32) it was found that Hickam had had a contract with the UFW from 1970 to 1973, that he was dissatisfied with the Union's performance, and candidly admitted that if he could he would rather not deal with the Union again. His conduct at these negotiations clearly reflected that attitude, and is evidence of bad faith. The company repeatedly delayed the bargaining by refusing to respond to Union proposals or rejecting Union proposals without giving sufficient reasons for doing so. For example, in response to the Union's initial language proposal, the company failed

to respond to twelve Union proposals, including some mandatory subjects to bargaining. The company gave no explanation of why these proposals had not been responded to, but merely said that they had been rejected. Upon questioning by the Union representatives, the reasons given for the rejections were insubstantial. For example, Hickam initially rejected the Union's family housing proposal, giving as the reason that the company did not provide any employee housing. The proposal, in fact, had nothing to do with housing provided to employees. The proposal was designed to encourage construction of family housing for farm workers locally. The company continued to reject that article until shortly before the start of this hearing, at which point it proposed an article similar to the one the Union had originally proposed. With respect to pay, which is a mandatory subject of bargaining, the company gave insubstantial reasons for its positions, and delayed responding until events forced it to. For example, Hickam initially rejected the Union's proposal on jury and witness pay. The reason given was that Hickam's workers had managed in the past to evade serving as witnesses or jurors. The company refused to make any counter-proposal. Later in the bargaining, as this hearing became imminent, the company proposed an article very similar to the one the Union had originally proposed. Hickam also refused entirely to negotiate over Christmas bonuses, and refused to negotiate over company payments for injuries suffered by workers on the job that were not covered by workmen's compensation, giving the reason that workmen's compensation would cover it. These delays in responding and refusals to respond are clear indications of bad faith on the part of the company.

Hickam rejected the Union's initial grievance and arbitration proposals as having too long a time frame period. When the Union proposed a grievance procedure with an expedited time frame, Hickam rejected that as being too short, and then proposed his own grievance procedure with an even shorter time frame. Given the length of his proposed time frame, Hickam's objection to the Union's expedited procedure as being too short is clearly specious. Hickam never explained this anomaly.

The final proposal made by either party was made on November 22nd by the Union. Four and one half months later, there had still been no response.

The above acts by the company representatives do not reflect any serious intent to resolve disagreements and reach agreement, and are clear indications of bad faith on the part of the company.

When Hickam declared that he could not afford to pay the Union proposals and offered to open his books to the Union, he insisted that the books be examined by either a trust attorney or a CPA. Hickam refused to allow the Union bookkeeper, who was experienced in such examinations, to examine his books, and insisted on either a CPA or a trust attorney. The original company offer to open the books, took place in October 1980. As of March 1981, the Union still had been unable to examine the company's books. Certainly, negotiations to examine the books were still under way in mid January. This sort of absurd obstruction is evidence of bad faith.

The above cases are merely examples of failures to respond, insubstantial responses, or delay by the company. The facts contain many more such examples. This entire course of conduct taken

as a whole, reeks of bad faith on the part of the company.

6. Denial of Access

The company failed throughout the bargaining to give accurate information with regard to workers' whereabouts and schedules. This conduct is evidence of bad faith.

When Debra Miller attempted to contact Hickam's peach pickers, the harvest foreman apparently manipulated the schedule so that when Miller arrived, at the agreed upon time, the work had already been completed and the workers had gone home. This act, since it is by an agent of the company, is imputable to the company.

On October 10th, Hector Rodriquez repeatedly interferred with Miller's attempts to talk to harvest workers at El Dorado. Since these harvest workers are employees of Hickams (see discussion on custom harvesting above), this conduct by one of Hickam's supervisors is imputable to Hickam. The clear exhibition of hostility towards the Union displayed here could have no other effect than to restrain workers in the exercise of their Section 1152 rights.

The above interference with the workers' attempts to act collectively in their own interest is clearly an indication of bad faith.

7. The Discharge of the Lopez's

The company claims that the Lopez's were discharged for cause. This appears not to be the case, at least so far as Marguerita Lopez is concerned. The testimony indicates that she was warned probably no more than once. Hector's foreman testified that it was common for an employee to receive at least one warning a day. Marguerita appears to have been fired because of her relationship with

Juan. Until this point, she had been considered a reliable worker, and had even been selected to do supervisory work for Hickam. The evidence simply does not support the allegations that Marguerita Lopez was fired for cause.

Juan Lopez was warned about his bad work at least twice on the day in question, and it is very possible that he was warned more than that. It seems unlikely that Juan was singled out for discipline because of his earlier complaints about his working conditions. The same complaints had been made by other employees, but none of them were discharged or disciplined. It appears most likely that Juan was discharged because of his consistently poor work and refusal to respond to the criticisms of it by the supervisors. The defects in Juan's work were observed independently by two different supervisors, and were confirmed by still a third. Moreover, Juan did not appeal the discharge to Hickam, although he had appealed to Hickam in the past when he felt he had been unfairly treated. Because of these facts, I must find that Juan Lopez was discharged for cause and Marguerita Lopez was not.

VIII. THE REMEDY

Having found the Respondent engaged in certain unfair labor practices within the meaning of Section 1153(a), (c), and (e) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Having found the Respondent failed to bargain in good faith with the UFW in that Respondent refused, delayed, or failed to supply relevant bargaining information requested by the UFW that was in Respondent's possession, I shall recommend that Respondent forward that information to the UFW without further delay and that the Respondent be ordered to do so.

Having found that Respondent failed to bargain in good faith with the UFW in that Respondent unilaterally changed wages, failed to provide and informed the bargaining representative, and otherwise exhibited a profound lack of sincerity in its bargaining conduct, which act made a mockery of these negotiations and of the Act, I shall recommend that Respondent cease and desist from such conduct and all other conduct complained of in the Complaint, and be ordered to cease and desist from infringing in any manner upon the right guaranteed to employees by Section 1152 of the Act. Respondent shall, additionally, commence bargaining in good faith with the UFW without delay.

Having found that Respondent denied the access of Union bargaining representatives to bargaining employees in violation of the Act, I recommend that Respondent cease and desist from such conduct, and be ordered to cease and desist.

Having found that Respondent discharged Marguerita Lopez without cause, I shall recommend that Respondent reinstate her with back

pay, and be ordered to do so.

Having found that Respondent's acts have caused economic injury to his agricultural employees, I recommend that Respondent make them whole for all such injuries, and to be ordered to do so. This make whole period is to run from March 3, 1980 until such time as Respondent commences sincere bargaining in good faith with the UFW that leads to either a contract or a bona fide impasse. The amount of this make whole shall be calculated in accordance with the formula used to calculate the amount of Respondent's liability in the make whole classification hearing for Charge 78-CE-8-D, pursuant to 4 ALRB No. 73.

The make whole remedy is appropriate. In 4 ALRB No. 73 (1978), review denied, 5th D.C.A. (1979), Hickam was found to have violated the Act by refusing to bargain with a certified representative of his employees, and was ordered to make those employees whole for their resulting losses. The make whole period was to run from June 23, 1977 (the date of Hickam's initial refusal to bargain with the Union after its certification) until such time as Hickam began good faith bargaining that led to either a contract or a bona fide impasse.

In the interests of relief for Hickam's employees, it seems that interim relief covering the period from July 23, 1977 to March 2, 1980 should be finally awarded at this time. The make whole period shall continue to run from March 3, 1980 until such time as Hickam does begin good faith bargaining that leads to a contract or a bona fide impasse.

Because of Respondent's history of insincere and bad faith dealing with the UFW and his agricultural employees, I further recommend that Respondent be ordered to make periodic reports showing his

compliance with the Board's order. These reports shall be made at intervals to be determined by the Board to agents that shall be designated by the Board.

RECOMMENDED ORDER

Respondent, Robert H. Hickam, its officers, agents, representatives, successors, and assigns shall:

1. Cease and desist from:

   a. Refusing to bargain collectively in good faith with the UFW as the exclusive representative of its agricultural employees as required by Labor Code Section 1153(e) and 1155.2(a), and in particular: (1) refusing to confer in good faith and submit bargaining proposals with respect to wages, hours, and other terms and conditions of employment; (2) refusing to furnish the UFW with relevant and necessary information requested for purposes of bargaining, including personnel and production information; (3) making unilateral changes in terms and conditions of employment of its employees without notice to or bargaining with the Union; and (4) failing to provide an informed bargaining representative familiar enough with ranch operations to be able to answer the questions with respect to the ranch operations which might reasonably be expected to arise in the course of bargaining.

b. In any manner restraining, coercing, or interferring with employees in the exercise of their right to self-organization, to form, join, or bargain collectively through representatives of their own choosing, except to the extent such a right may be affected by an agreement of the type authorized by Section 1153(c) of the Act.

c. Denying access by representatives of the UFW to bargaining unit employees at reasonable times for purposes related to the bargaining between Respondent and UFW, and in particular: (1) refusing to give timely and accurate information with respect to the job assignment and locations of employees; and (2) interferring in any way with UFW representatives attempts to communicate with bargaining unit employees at all reasonable times.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

a. Upon request, bargain collectively in good faith with the UFW and the exclusive representative of its agricultural employees, and, if an understanding is reached, embody such an understanding in a signed agreement. In particular the Respondent shall: (1) furnish to the UFW the information requested by it relevant to the preparation for and conduct of collective bargaining, in particular payroll, personnel and production information; (2) meet at

reasonable times and places to confer in good faith and submit meaningful proposals with respect to wages, hours, and other terms and conditions of employment; and (3) furnish a bargaining representative who is sufficiently informed with respect to ranch operations that he can answer all questions that might reasonably be expected to arise.

b. Permit UFW representatives to meet and talk with bargaining unit employees at any and all reasonable times and places, including at their work locations, so long as negotiations have not led to a contract or a bona fide impasse, and thereafter as provided by the Board's current applicable access regulations.

c. Make whole the agricultural employees employed by Respondent for any and all losses they may have suffered as a result of Respondent's refusal to bargain for the period of March 3, 1980 until the date on which Respondent commences collectively bargaining in good faith and thereafter bargains to a contract or a bona fide impasse, in accordance with the formula set forth in the make whole specifications for R. H. Hickam, 4 ALRB No. 73 (1978) (pursuant to Charge 78-CE-8-D, the make whole hearing in regard to which was heard immediately following the instant hearing}.

d. Offer to Marguerite Lopez, who was not discharged for cause, immediate and full reinstatement to her former or substantially equivalent job without prejudice, and to make her whole for any loss of payment she may have suffered because of her discharge for the period from November 4, 1980 until the date determined to be the last date of the Emperor harvest in 1980.[8]

e. Execute and post a Notice containing the contents of this order, and the attached Notice, in writing, in Spanish and English, in conspicuous places on Respondent's property for a one year period, at locations to be decided by agents of the Board. Respondent shall exercise due care to replace any Notice which has been altered, defaced or removed.

f. Respondent, his representative, or a Board agent shall read and explain the Notice to Respondent's agricultural employees during working hours and without loss of pay, at a time to be determined by the Regional Director, and allow a Board agent to answer questions of the employees outside the presence of Respondent or his representatives.

g. Respondent shall deliver copies of the Notice to all of his agricultural employees during the next peak season.

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[8]The Emperor harvest is the operation she was discharged from.

h. Respondent shall mail copies of the Notice to the last home address of each of his 1980 agricultural employees.[9]

i. Respondent shall notify the Regional Director of of the Regional Office within thirty (30) days of receipt of a copy of this decision and order of steps Respondent has taken to comply therewith, and to continue reporting periodically thereafter until full compliance is achieved.

j. Respondent shall preserve and make available to the Board or its agents, upon request, for examination and copying, all records relevant or necessary to a determination of the amount due employees under this order and compliance with this order.

4. It is further ordered that the certification of the UFW, AFL-CIO, as the exclusive bargaining agent for Respondent's agricultural employees be extended for a period of one year from the date from which Respondent begins to bargain in good faith with said Union.

Dated: November 13, 1981

Leonard M. Tillem
Administrative Law Officer

[9]Although to some extent the Notices do duplicate each other, this is the only way to be certain that all employees affected are reached and such duplication will serve as a reminder to employees with respect to Respondent's past violations and continued assurances to the employees of the protection of the Act.

NOTICE TO EMPLOYEES

In July, September, October, and November 1980, the United Farm Workers of America, AFL-CIO (UFW), filed charges alleging violations of the Agricultural Labor Relations Act (ALRA). The UFW alleged that Robert H. Hickam has refused to bargain in good faith with the UFW, has unlawfully discharged Juan and Marguerita Lopez and also interferred with employee's rights to meet and talk with the UFW about the negotiations with Hickam.

After a hearing where each side had a chance to present its facts, the Agricultural Labor Relations Board (ALRB) has found that we did not bargain in good faith with the UFW, that we unlawfully discharged Marguerita Lopez, and that we interferred with the employee's rights to meet and talk with the UFW in violation of the law.

We will do what the Board orders us to do and also tell you that:

Because the United Farm Workers of America, AFL-CIO, was selected by a majority vote of our employees as their exclusive bargaining agent in a Board conducted and certified election, we must bargain in good faith with the UFW. We must also allow workers to meet and talk with the UFW about the negotiations.

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;

2. To form, join, or help unions;

3. To bargain as a group and choose whom they want to speak for them;

4. To act together with other workers to try to get a contract or to help or protect one another; and

5. To decide not to do any of these things.

Because it is true that you do have these rights, we promise that:

WE WILL bargain in good faith with the United Farm Workers until we reach a contract or a bona fide bargaining impasse.

WE WILL allow the employees to meet and talk with the representatives of the UFW about the negotiations.

WE WILL make whole those of you who were employed during the appropriate period for any losses of pay which resulted from our refusal to bargain in good faith with the UFW.

WE WILL return Marguertia Lopez to her job and pay her for the time she lost due to her discharge.

Dated:_____

ROBERT H. HICKAM

APPENDIX A

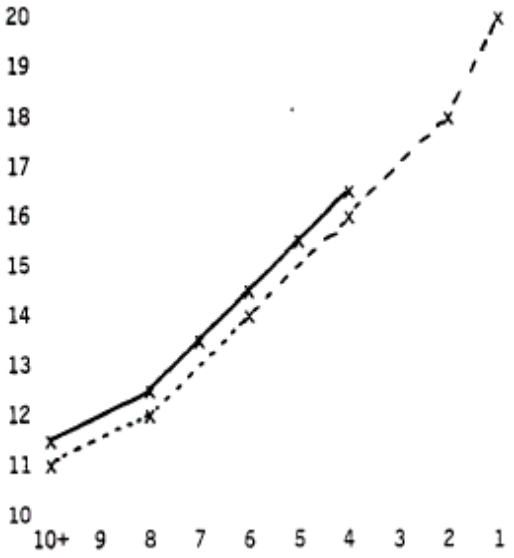
Company offers (left column = tons per acre of yield; right column = proposed rate per gondola).

September 17 Proposal	
10+	$11.00
8+	12.00
6+	14.00
4+	16.00
2+	18.00
1+	20.00

September 24 Proposal	
10+	$11.50
8+	12.50
7+	13.50
6+	14.50
5+	15.50

September 30 Proposal	
10+	$11.50
8+	12:50
6+	14.50
4+	16.50

Figure 1: Spencer Hipp s view

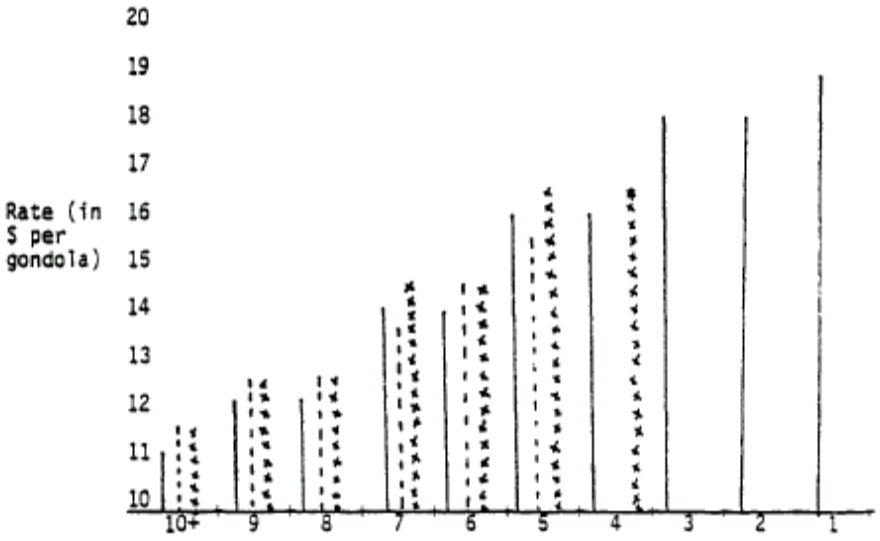


Rate (in $ per gondola)

Yield (in tons per acre)

Solid line shows the September 17 proposal
Dotted line shows the September 24 and 30 proposals (the September 30 proposal adds only the "x" at 4 tons and $16.50)

Figure 2: Deborah. Miller's view



Yeild (in ton per acre)

Solid line shows the September 17 proposal by the Company Dotted line shows the September 24 proposal by the Company Line of "x's" shows the September 30 proposal by the Company

Note the rates for 5 and 7 tons. These are the ones Miller objected to.